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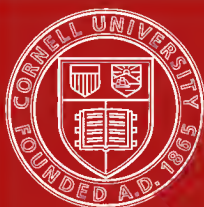
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DIGEST
OF THE
LAW OF PROPERTY IN LAND
PARTS I., II.



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AN
ELEMENTARY
DIGEST
OF THE
LAW OF PROPERTY
IN
LAND

BY
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BARRISTER-AT-LAW

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PREFACE.

THE complaint is found in the earliest writers on our law, that the laws and customs of the realm are not put into writing, that they may be known by all who have to administer or to obey them (*a*). This complaint has been continually repeated, under an ever increasing pressure of the inconvenience, but with very little attempt at a remedy (*b*), up to the present time; when, at last, it has called forth some more decided efforts for relief.

These efforts have already produced some useful results, chiefly in rendering the Statute law more compendious and accessible; but in the direction of their immediate object of reducing to writing that body of law which rests upon custom and precedent, they appear to have been arrested by the preliminary question whether the written exposition of law should take the form of a Code or a Digest; and much discussion has ensued upon the essential distinctions and comparative advantages of these two forms of a *corpus juris*, but without any conclusion as yet upon the future course of proceeding.

If, as seems generally agreed, the main distinction between

(*a*) See Horne's Mirror of Justices, Chap. V. sect. 1, 3, where this is reckoned as one of the "abusions" of the common law.

(*b*) See Bacon's "Offer of a Digest of the Laws of England," Law Tracts, p. 15.

a Code and a Digest be that a Code is the immediate emanation of authority, at once both the source and the text of the law, legislating as it speaks ; while a digest is an exposition of the law compiled from the various existing sources, having no independent authority beyond the credit due to the compilation ; then a Code, as such, is necessarily a public undertaking and must await the action of the public powers. It is at once seen to be altogether beyond the scope of private exertion and enterprise.

But if, passing over this extrinsic point of difference, it be considered that either Code or Digest must contain the same matter, and for the same purpose, namely, that the law may be readily accessible to all ; and that for this purpose it must be equally an object with either that it should be framed in the most serviceable and intelligible form ; also that even public authority must submit to the laws of scientific order, and that every general exposition of law, whether Code, or Digest, or separate Treatise, to be practically convenient and useful, must conform to a correct method and to sound principles of arrangement ; then it may be seen that a wide field of inquiry lies open, in which private exertions may be permitted to assist,—a field of inquiry in which public authority can stand at no advantage, and in which the result of any successful exertions would be equally applicable either to a Code or a Digest, either to authoritative or unauthoritative expositions of law.

The following work is an essay in this field of inquiry ; and it has been undertaken and executed under a firm conviction that an essential condition of obtaining a public Code or Digest, whether of the whole or of detached portions of the law, will be found in the attainment of correct principles of order. The law has here been carefully collected, point by point and case by case, as found in its

various sources, and has been arranged according to the connections and relations of the matter, with the view of developing the principles of order to which it conforms, and by means of which it may be presented as harmonious and coherent.

The law of property in land has been selected, on this occasion, as the subject of treatment,—a branch of the law, which, although from its special character in English law it may not perhaps be thought the best adapted for the purpose, yet from its necessary importance in that as in every other system of jurisprudence and from the many and various interests affected by it, appears to be, at least equally with any other, worthy of attention and promising in practical results.

The law of property in land has hitherto been treated, for the most part, upon the basis of history; the law of the present day is made intelligible only by reference to that of past ages; and through a long course of changes, more or less obscure, we derive from remote antiquity the present form of aboriginal institutions. The scientific method of treatment, that is, a treatment having reference to the internal order and connections of the subject has been thought inapplicable or, at least, has been made a subordinate consideration. But, while the necessity of the historical method in the present state of the law may be fully recognised, it may yet be maintained that an improved order of treatment may be employed as an important auxiliary. The scientific method of treatment is certainly, in general, the practical one; and it may be called in aid for presenting the living law, as it exists, in a more accessible and efficient working form.

The question of a Code, as to this branch of law, obviously depends upon the possibility of separating the

positive results of the law from the series of historical events and legislative acts through which they have reached us ; abstracting the rules of law from their various sources, and stating and arranging them in a uniform style and method ;—a process which might be described as a translation of the law from an historical to a scientific form of exposition. For the purposes of a Code law must be dissociated from history and must appear as positive law. Historical development finds no place in a Code ; nor indeed does any sort of discursive explanation or argument. The very idea of a Code, as constituting the law itself, not only as to the letter but also as to formal authority, is at once self-sufficient, and precludes the introduction of any other grounds of consideration and judgment. The order, consistency, and internal relations of the parts comprise the only argument and explanation therein admissible.

The present attempt at an extended application of the principles of order may, therefore, serve some purpose in pointing out some of the difficulties to be encountered in the undertaking of a Code of this branch of law. It may, perhaps, shew that the law of real property will not be capable of a very complete systematic arrangement, until it has been reduced by a large process of amendment to greater harmony and uniformity in its component elements. It will certainly serve to show how extensive a space in the statement of the law is at present necessarily occupied in explaining the sources of the law, their diversity, and the remote deduction of their origin.

The present work makes no pretence of competing with or improving upon the existing treatises upon the various matters here included by a more complete or more accurate statement or discussion of the matter of the law ; in this respect it aims merely at giving the law, as it exists, with

such accuracy and completeness as is reasonably to be expected in an elementary and compendious work. The reader is referred to the numerous well approved treatises on the various branches of real property law for further details and for the discussion of special points of doubt and difficulty. But for the advantageous perusal of those treatises it is for the most part requisite that the reader or student should be prepared with a clear conception of the subject in general ; and the present work may, it is hoped, be found useful in contributing some means towards the attainment of such a conception.

With respect to fullness of detail, however, there may be claimed on behalf of a treatise, arranged with especial reference to order and unity of plan, the capacity, at least, of comprising an extensive degree of detail within comparatively narrow limits of space ; because the order itself should serve to indicate many analogies and connections, distinctions and qualifications in the several parts of the subject, which in a more detached, or less methodical treatment of the same topics require to be noticed with particularity on every occasion, in order to prevent misapprehension arising from a too general style of expression.

It may be further observed that a subject arranged upon a scientific order, provided that order be the correct one, is capable of being readily and without confusion extended into indefinite detail by the mere process of continued development. Wherefore, to assist those who may have occasion to pursue their inquiries further on any point the necessary authorities, including all the more recently reported cases, have been here collected in the notes.

As the chief object in view has been to enforce the conclusion that the essential virtue of a digest is to be found in the order of arrangement, it has not been thought worth

while to contrive or adhere to any strict formality of style. Much care has been taken that the statements of the law should be accurate, clear, and concise, and as nearly as possible in the language of the original sources ; some care has also been taken to preserve a certain general uniformity of expression ; but it has been found convenient frequently to admit some explanatory observations, and to cite some illustrations from decided cases, which may, perhaps, be considered informal and irregular in a work bearing the title of a Digest of law.

In a Code or authoritative Digest a more formal and perhaps legislative style would be expected, and a stricter condensation of matter. Such a work would probably be framed, after the model of existing codes, with an exact subdivision into articles and paragraphs, numbered, perhaps, for convenience of reference. In the present far slighter undertaking the attempt at such an elaboration of form, while it would have caused much additional labour, would have imposed a great restriction upon the freedom of treatment, and would have imported into the work an assumption of perfection and completeness to which, in its present state, it makes no pretence.

If an excuse be required for the separate publication of the first two Parts of the work, beyond the indulgence that may be asked for an undertaking which, with every care for compression, has been found greatly to exceed the moderate limits originally contemplated, it may perhaps be allowed in the embarrassment caused by impending changes in the law. In the course of preparing this volume the Supreme Court of Judicature Act, so largely unsettling the relations of law and equity, has become an accomplished,

though deferred, fact ; and the Land Titles and Transfer Act, with its compulsory system of Registration, an assured expectation. The former act, together with the Vendor and Purchaser Act, 1874, containing amongst various provisions supplementary to the former Act, the important enactment by which the priority and protection hitherto allowed in equity to the legal estate has been abolished, have been noticed in this volume, so far as can be safely ventured before they have been judicially interpreted. But the Registration Act promises such extensive changes in regard to the transfer of land and the practice of conveyancing, involving, as it does, an entirely new and exclusive mode of conveying the legal title, that it would be useless to attempt any further progress with the Part of the work to which these matters belong, until the Act has been finally settled by the legislature. The Parts still awaiting publication are, in other respects, in an advanced state of preparation ; and it is calculated that they may be contained in another volume of equal bulk with the present. The Parts contained in this volume are sufficiently complete in themselves to admit of separate publication ; but the author respectfully deprecates a final judgment upon his work before seen in its integrity, because many matters may appear here deficient which are reserved for their appropriate place in a later Part, and he would prefer that it should be judged by the complete scheme rather than by the mode of execution in detail.

SUMMARY OF DIGEST (*a*).



PART I. THE SOURCES OF THE LAW.

CHAPTER I. The law of Freehold Tenure.

II. The law of Customary Tenure.

III. The law of Uses.

IV. The law of Trusts and Equitable Interests.

PART II. ESTATES IN LAND.

CHAPTER I. The Limitation of Estates as to Quantity.

II. The Limitation of Estates as to Time of Commencement.

PART III. LAND AS THE SUBJECT OF PROPERTY.

CHAPTER I. Rights of Use and Enjoyment.

(1) As to the various kinds.

(2) As to appropriation to the various Estates.

(*a*) The explanation of this arrangement is given in the Introduction. The contents of Parts III., IV., V., are here given provisionally and subject to alteration in further preparation for publication.

CHAPTER II. Rights of Use and Enjoyment in the
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- (1) Easements.
- (2) Profits *à prendre*.
- (3) Public Rights and Customs of the
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- (4) Rents.

PART IV. THE TRANSFER OF PROPERTY IN LAND.

CHAPTER I. By Conveyance.

- (1). The Power of Disposition incident
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- (2). The Forms of Conveyance.
- II. Disposition by Will.
- III. Descent.
- IV. The law of Merger.
- V. Escheat and Forfeiture.
- VI. Legal Process, Bankruptcy, etc.

PART V. THE LAW OF PERSONS AS AFFECTING
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- (1). Joint Tenancy.
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ADDITIONS AND CORRECTIONS.

This list includes the principal Statutes and Decisions to the end of 1879.

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59. Add a reference to the "Real Property Limitation Act, 1874," 37 & 38 Vict. c. 57.
76. Note (e), add:—*Lascelles v. Onslow*, L. R. 2 Q. B. 433; 46 L. J. Q. B. 333.
79. (a):—*The Queen v. Venn*, L. R. 10 Q. B. 310; 44 L. J. Q. B. 158.
87. (c):—*Att.-Gen. v. Tomline*, L. R. 5 C. D. 750; 46 L. J. C. 654.
89. (c):—*Brown v. Wales*, L. R. 15 Eq. 142; 42 L. J. C. 45; *Spike v. Harding*, L. R. 7 C. D. 871; 47 L. J. C. 323.
122. (b) and 124 (a):—*Baker v. White*, L. R. 20 Eq. 166; 44 L. J. C. 651.
123. (a):—*Camberwell Building Soc. v. Holloway*, L. R. 13 C. D. 754.
133. (b):—*Isaac v. Wall*, L. R. 6 C. D. 706; 46 L. J. C. 576.
134. (a):—*Eykyn's Trusts*, L. R. 6 C. D. 115; *Bennet v. Bennet*, L. R. 10 C. D. 474.
136. (d):—*Kronheim v. Johnson*, L. R. 7 C. D. 60; 47 L. J. C. 132.
137. (c):—*Lysaght v. Edwards*, L. R. 2 C. D. 499; 45 L. J. C. 459.
139. (a):—*Sewell v. King*, L. R. 14 C. D. 179; 49 L. J. C. 73.
143. (b):—38 & 39 Vict. c. 87. *Morgan v. Swansea*, L. R. 9 C. D. 582.
146. (c):—See 37 & 38 Vict. c. 78, s. 3.
160. (c):—*Wingfield v. Wingfield*, L. R. 9 C. D. 658; 47 L. J. C. 768.
184. (a):—*Dawson v. Small*, L. R. 9 Ch. 651.
196. (e):—*Hickman v. Upsall*, L. R. 4 C. D. 144; 46 L. J. C. 245.
200. (f):—38 & 39 Vict. c. 92, s. 51. *Wilkinson v. Culvert*, L. R. 3 C. P. D. 360; 47 L. J. C. P. 679.
211. (c):—*Mellor v. Watkins*, L. R. 9 Q. B. 400.
- 218 (a) and 242 (c):—*Astley v. Earl of Essex*, L. R. 18 Eq. 290; 43 L. J. C. 817.
228. (d):—*Davenport v. The Queen*, L. R. 3 Ap. Ca. 115; *Keene v. Biscoe*, L. R. 8 C. D. 201; 47 L. J. C. 644.
229. (c):—*Walrond v. Hawkins*, L. R. 10 C. P. 342; 44 L. J. C. P. 116.
234. (b):—*Evans v. Davis*, L. R. 10 C. D. 747; 48 L. J. C. 223.
236. (a):—*Bellairs v. Bellairs*, L. R. 18 Eq. 510; 43 L. J. C. 669; *Jones v. Jones*, L. R. 1 Q. B. D. 279; 45 L. J. Q. B. 166.
237. (f):—*Shaw v. Ford*, L. R. 7 C. D. 669; 47 L. J. C. 531.
250. (c):—*Spencer v. Harrison*, L. R. 5 C. P. D. 97; 49 L. J. C. P. 193.
265. (c):—*Lancefield v. Iggulden*, reversed L. R. 10 C. 136; 44 L. J. C. 203.
266. (b):—*Jones v. Caless*, L. R. 10 C. D. 40; *Scott v. Cumberland*, L. R. 18 Eq. 578; 44 L. J. C. 226; *Gowan v. Broughton*, L. R. 19 Eq. 77; 44 L. J. C. 275.
274. (d):—*Mason v. Robinson*, L. R. 8 C. D. 411; 47 L. J. C. 660.
279. (a):—*Campbell v. Holyland*, L. R. 7 C. D. 166; 47 L. J. C. 145.
286. (a):—*Jones v. Davies*, L. R. 8 C. D. 205.
288. (b) and 290 (b):—40 & 41 Vict. c. 34.
289. (c):—*Rossiter v. Rossiter*, L. R. 13 C. D. 355; 49 L. J. C. 36.
307. (a); 309 (a):—*Lysaght v. Edwards*, L. R. 2 C. D. 499; 45 L. J. C. 459.
328. (b):—40 & 41 Vict. c. 33.
369. (c):—*Ingram v. Scutten*, L. R. 7 H. L. 408.
371. (c):—*Emmet v. Emmet*, L. R. 13 C. D. 484; 49 L. J. C. 295.
380. (a):—40 & 41 Vict. c. 18.
388. (b):—*Andrews v. Andrews*, 49 L. J. C. 184.
412. (b):—*Boyes v. Cook*, L. R. 14 C. D. 53; 49 L. J. C. 350.
418. (a):—*Meredith's Trusts*, L. R. 3 C. D. 757.
436. (b):—*Re Capon's Trusts*, L. R. 10 C. D. 484; 48 L. J. C. 355.
444. (a):—*Picken v. Matthews*, L. R. 10 C. D. 264; 48 L. J. C. 150.
451. (b):—*Moseley's Trusts*, L. R. 11 C. D. 555.
468. (d):—*Wetherall v. Thornburgh*, L. R. 8 C. D. 261; 47 L. J. C. 653.
- 485, 492, 493, 507:—"Vendor and Purchaser Act, 1874," s. 7, repealed by 38 & 39 Vict. c. 87, s. 129.
503. (e):—*Ex p. Evans, re Watkins*, L. R. 13 C. D. 252; 49 L. J. B. 7.
505. (a):—*Lee v. Clutton*, 46 L. J. C. 48.
514. (b):—*Mills v. Jennings*, L. R. 13 C. D. 639; 49 L. J. C. 209.

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INTRODUCTION.

Rights distinguished—*jura in rem*—*jura in personam*.

Subjects of property distinguished—land and goods.

Property in land and goods distinguished—estates in land
—various uses of land as subject of property—title and possession.

Principles of the civil law of property.

English law of property in land—possessory and future estates
—difference between the English and the civil law.

Distinction of things as real and personal—real and personal property—real and personal actions.

Order of treatment—estates in land—land as subject of property—transfer of property in land—law of persons, as affecting property in land.

Sources of English law—law of freehold tenure—law of customary tenure—equity—uses—trusts—statute law.

Arrangement of the work into Parts.

Jurisprudence distinguishes Rights, using the term in the strict legal meaning, into the two classes of Rights to Things and Rights against Persons, familiarly known in the civil law by the terms *jura in rem* and *jura in personam* (a). Rights distinguished as
jura in rem and
jura in personam.

(a) "The distinction between rights—is that all-pervading and important distinction which has been assumed by the Roman Institutional writers as the main groundwork of their arrangement: namely, the distinction between rights *in rem* and rights *in personam*; or rights which avail against persons generally or universally, and rights which avail exclusively against certain or determinate persons. The

terms '*jus in rem*' and '*jus in personam*' were devised by the civilians of the middle ages, or arose in times still more recent. I adopt them without hesitation—for of all the numerous terms by which the distinction is expressed, they denote it the most adequately and the least ambiguously." 2 Austin Jur. 32, Lect. xiv; 3 Ib. 189. Compare 1 Ortolan Inst. Part 2, tit. 2, Des Droits, p. 491, 7th ed.

Jura in rem.

Rights to things, *jura in rem*, have for their subject some material thing, as land or goods, which the owner may use or dispose of in any manner he pleases within the limits prescribed by the terms of his right. A right of this kind imports in all persons generally the correlative negative duty of abstaining from any interference with the exercise of it by the owner; and by enforcing this duty the law protects and establishes the right. But a right of this kind does not import any positive duty in any determinate person, or require any act or intervention of such person for its exercise and enjoyment (a).

Jura in personam.

Rights against persons, *jura in personam*, on the other hand, have for their subject an act or performance of some certain determinate person, as the payment of money, the delivery of goods and the like. A right of this kind imports the correlative positive legal duty in the determinate person to act in the manner prescribed. It depends for its exercise or enjoyment upon the performance of that duty, and is secured by the legal remedies provided for a breach of performance. This class of rights includes the rights arising from contracts and all transactions of the nature of contract, which form the branch of law known as the Law of Contracts (b). The present work treats of the former class of *jura in rem*, and of only one subject of that class.

The subjects of property distinguished.

Rights to things, *Jura in rem*, vary and are distinguished according to the things or material subjects in the use or disposal of which the right consists.

Things, as subjects of property, may be referred to two principal kinds, distinguished by qualities inherent in their nature.

The one kind, which may be designated by the general

(a) 2 Austin Jur. 33, Lect. xiv.

(b) Austin, *supra*. See Leake on Contracts, Introduction.

term *Land*, is characterised by the abstract physical Land. qualities:—that the subject is immoveable and indestructible; that the use and enjoyment of it is perpetual and uniformly continuous.

The other kind, which may be designated by the Goods. general term *Goods*, is characterised by the qualities:—that they are moveable and perishable; that the use and enjoyment of them is not perpetual nor uniform, but is transitory and exhaustible. They are, in various degrees, consumed or destroyed in using,—*quæ in ipso usu consumuntur*.

These two classes are designated in the Roman civil law after their most characteristic quality, by the terms “moveable” and “immoveable,”—*res mobiles* and *res imobiles* or *quæ soli sunt* (a).

The distinctions of quality in the subjects of property form the ground of important differences in the law. Property in land and goods distinguished.

By reason of the perpetuity and uniform continuity of Estates in land the use of *Land* the future use may be considered separately from the present possession, and may be limited or measured out by intervals of time and treated in distinct property or properties. It is true, the use and possession of land *in specie* cannot be anticipated; it flows on uniformly and concurrently with the progress of time by which the property is measured out; but though the possession be deferred, the future use or property is capable of presently defined ownership, with a present power of sale or exchange whereby it may be made available for present purposes. The total or indefinite extension, as to duration, of property in land may thus be portioned out by means of successive intervals of use into separate properties, measured by terms of years, or by lives, or other specified times or events of certain or uncertain occurrence. In this manner are produced the

(a) See 1 Ortolan Inst. Part 1. Code Civil, liv. ii. tit. 1. tit. 2, Des Choses, p. 461.

various *Estates* in land which are familiar, at least, to English Jurisprudence (a).

Absolute property in goods.

But *Goods*, as a class, by reason of their transitory and perishable nature are incapable, except in a slight degree, of this mode of treatment, and the property in such subjects is, in general, simple and absolute.

There are, however, included in this class of things subjects of various degrees of permanency, which may, therefore, in corresponding degrees be assimilated to land in legal treatment. Accordingly, the general legal doctrine that the property in goods must be simple and absolute is largely qualified by various concurrent legal doctrines and principles; such, for instance, as the law of bailment, or the delivery of the possession of goods under contracts for special and limited purposes. Also English Courts of Equity by means of the doctrine of trusts create temporary and substitutional interests in property of this kind; and by the peculiar equitable doctrine of conversion it may be impressed, for many purposes, with the quality of permanence, and may be distributed in as many and complicated estates and limitations as land itself.

The various uses of land, as subject of property.

Land, again, is a complex subject, subservient to a great variety of beneficial uses, some derived from the surface, some from the regions above and below the surface, some from the various productions of the land, animal, vegetable, and mineral;—and some of the uses and profits of land are so far independent and separable

(a) “An estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time, for he who has a fee-simple in land has a time in the land without end, or the land for time without end, and he who has land in tail has a time in land or land for time as long as he has issue of his body, and he who has an estate in land for life has no time in it longer than for

his own life, and so of him who has an estate in land for the life of another or for years.” Plowden, 555.

“All estates are but times of their continuances.—There are two substantial and essential differences of estates, the one limiting the times, —and the other maketh difference of possession, as remainder; all other differences of estates are but accidents.” Bacon’s Tracts, p. 337.

from the rest that they may be appropriated as distinct subjects of property. Such are the rights of taking minerals, rights of common, rights of way, and numerous other rights of using land for profit, or for mere convenience. Whence arises an extensive branch of law concerning the various uses and profits of land and their separate appropriation.

On the other hand, the kind of property designated by the term goods, while it comprises many species of things each subservient to a distinct purpose, does not admit, as to specific things, of a like division into separate uses and property; and there is no corresponding branch of law relating thereto.

Again, by reason of the fixity and permanency of land the difficulty of ascertaining and identifying any portion is inconsiderable, and the title is conveniently referred to records and documentary evidence. Property in land, with few exceptions, is transferred only by written instruments; while all future estates and interests, which form so large a proportion of that class of property, being incapable of possession, rest entirely upon documentary title. Possession of land, if wrongfully taken, can always be restored; and mere possession, though presumptive evidence of right, is of no efficacy whatever against proof of a rightful title; nor is prolonged possession of any avail except by the operation of time in extinguishing adverse claims (a).

Title and possession of land.

On the other hand, by reason of the moveable and fluctuating nature of goods and the consequent difficulty of tracing and identifying them, and by reason also of the use lying for the most part in consumption, possession

Title and possession of goods.

(a) "With regard to real property, the possession is considered as nothing, but the title only is looked to." Parke, B., in *Boydell v. M'Michael*, 1 C. M. & R. 177. "The law gives no special privilege to the length of possession.—Under the statute of limitations this court

has nothing to do with the nature, origin or duration of the defendant's possession, but simply whether the plaintiff has or has not proceeded in due time after the accrual of his right of suit." L. R. 8 Ch. 397; 42 L. J. C. 302, in *Vane v. Vane*.

is, in general, taken as sufficient proof of property, and the mere transfer of possession as a sufficient act of conveyance. Possession, if wrongfully taken, can seldom be restored, and it generally happens that the only practicable restitution is by compensation in value.

Principles of the
civil law of
property.

In the Roman civil law and the systems founded upon it, as the French 'Code Civil,' the capacity of land to be appropriated in possessory and future interests is not directly recognised. Property in land and in goods is reduced to one and the same system of rules, subject only to necessary modifications in detail. Property, strictly so called, whether in land or in goods, things immoveable or moveable, is entire, indivisible, and absolute. Rights of temporary possession, so far as they are recognised, are not considered as infringing upon the integrity of property, but are ranged, together with rights to detached uses and profits, in a separate class under the denomination of *jura in re alienâ* or simply *jura in re* and opposed to *dominium* or *jus in re propriâ*. A corresponding distinction is marked in the terms *corporis dominus* and *is qui jus habet*, the former having possession and the latter merely a *quasi possession*;—also in the classification of things as *res corporales* and *res incorporales, quæ in jure consistunt* (a).

Dominium and
jura in re.

English law of
property in land.

The full recognition of possessory and future property in land may be said to constitute the characteristic feature of the English system. It is made a leading distinction by Blackstone that "estates, with regard to the time of their enjoyment, may either be in possession or in expectancy (b) ;" and upon this capacity of sustaining

Possessory and
future estates.

(a) 2 Austin, 479; 3 Ib. 187; Savigny on Possession, b. I, § ix. xii., in Perry's Transl. 76, 131; 1 Ortolan Inst. 447, 509, 7th ed.; Code Civil, liv. ii. tit. ii., De la Propriété, tit. iii., De l'Usufruit, etc. In the French code substitutions of ownership are

absolutely prohibited, Art. 896; with an exception in favour of children, Art. 1048; and, where no children, in favour of brothers and sisters, Art. 1049.

(b) 2 Blackst. Com. 163.

future estates depends all the intricacy of limitations occurring in the settlement and distribution of land.

The cause of this difference between the Roman and English systems seems to lie in the derivation of the latter from the Feudal system; under which the originally precarious interest of the tenant became gradually established as a fixed estate or property in the land as against the lord, whose property was thereby converted into a reversionary or future estate. The principle of division of estates thus instituted was subsequently worked out by conveyancers and sanctioned by the courts to the full capacity of the subject for such mode of treatment, and in subservience, it must be presumed, to the exigencies of the public. The Legislature interfered but seldom with this process of development; and even its occasional interference has operated in most cases in aid of the principle by facilitating the creation and disposition of future estates, and by liberating future estates and interests from their ancient dependance upon the present seisin or possession (a).

Difference
between Roman
and English
systems.

On the other hand, the English law of property in goods, conforming to the different nature of the subject, does not admit the same mode of limitation. According to Blackstone :—"By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed." (b).

No future pro-
perty in goods.

(a) "While in this country, and in every other country whose jurisprudence is of a feudal extraction, the difference between real and personal, or immoveable and moveable property is so strongly marked, and the legal qualities and incidents of the two species of property, are in

so many important consequences, utterly dissimilar, the distinction between them in the civil law, except in the term of prescription, is seldom discoverable." Butler's note to Co. Lit. 191 a, II. 2; and see Ib. V. 3; Butler's note to Fearn, C.R. 567.
(b) 2 Blackst. Com. 398.

Thus it appears that in the English law property in land and property in goods are regulated upon different systems, and require to be treated as separate branches of law.

Things real and personal.

According to English law the subjects of property are divided into *Things real* and *Things personal*. The class of *Things real* comprises land, and all the separate uses, profits and interests in land which are capable of being treated as separate subjects of property. The class of *Things personal* comprises goods and all things moveable. The terms *Real property* and *Personal property* follow for the most part this division of things the subjects of property (a).

Real and personal property.

Distinction derived from real and personal actions.

The terms real and personal were originally applied, following the civil law, to actions, which were distinguished as *real* and *personal*, *in rem* and *in personam*: the former, claiming to recover the thing *in specie*, were appropriate to land, which, as being immoveable and indestructible, was always at hand to answer the claim; the latter, claiming to recover compensation or damages, applied to injuries to the person and property, including moveable things as not being adaptable to recovery *in specie*. Hence the terms real and personal were afterwards transferred to the subjects of property, to the deprivation of which such actions were appropriate, and they were so used in the time of Coke (b).

(a) 2 Blackst. Com. 16, 384, 389, 397; 3 Ib. 117, 144. But the term personal property includes certain interests in land known as chattels real, to be explained hereafter, and it further includes all rights arising out of contracts and rights of action.

(b) Bracton, 7 b; 101 b-102 b. According to Coke, "goods or chattels are either personal or real. Personal, as beasts, household stuff, and such like, called personal, because for the most part they belong to the person of a man, or else for that they are to be

recovered by personal actions. Real, because they concern the realty, as terms for years of lands or tenements, and such like." Co. Lit. 118 b; see Ib. 1 b, 6 a.

Blackstone explains *personal* property as consisting in "property which may attend a man's person wherever he goes, and from thence receives its denomination." This explanation of its scope and derivation would confine it to *moveables*, and it would then conform in extent with the international maxim *mobilia sequuntur personam*, but it is not wide enough to include

The abstract considerations above noticed respecting property in land may serve as a guide to the distribution of the subject or order of treatment. They may be referred to the three following heads, namely,—The various estates and interests admissible in land in general ;—The specific nature and qualities of land as the subject of property ;—And the title and modes of transfer of property in land.

Order of treatment.

For the purpose of investigating the various estates and interests which may be had in land, that quality of the subject only need be considered upon which the limitation of estates is based, namely, perpetuity and uniformity of use ; abstracting and reserving for after consideration the various specific uses and modes of enjoyment of which land is capable, some of which may be found to fall short of or deviate from the assumed basis of limitation, and consequently to require modifications of the general law of estates in its application to the subject *in specie*.

Estates in land.

Property in a subject of the standard quality here assumed admits of variation only in two respects, namely, in the quantity or duration of the possession, and in the time when the possession is to begin. And accordingly this Part of the work will treat of the rules of law regulating the limitation of estates, and will be conveniently divided into two Chapters treating respectively of the limitation of estates as to quantity or duration, and of the limitation of future estates.

The inquiry may then be directed to the specific nature of land as subject of property. Land will here be considered as it exists in fact, a complex subject constituted of many and varied specific uses and profits, all of which, so far as they are important in law, must be passed in review.

Land as subject of property.

chattels real or personal interests in land, to be explained hereafter. 3 Blackst. Com. 144; and see 2 Ib. 16,

384; see *Freke v. Lord Carbery*, L. R. 16 Eq. 461, that chattels real are not within the above maxim.

Upon such review it will appear that land, to a considerable extent, deviates from the assumed standard of perpetuity and uniformity; some of the uses and profits of land are not uniform, but recurrent at intervals; others are neither uniform nor recurrent, but occasional only. Therefore, the system of limitation of estates, founded on the assumption above made, cannot be applied without the modifications in respect of use and enjoyment required to meet such cases of deviation. These will appear in the apportionment and restriction of the rights of use and enjoyment appropriated to the various estates and interests previously defined.

Again, as already noticed, some of the uses of land are found to be capable of being detached from the general ownership and appropriated in separate property. One person may be entitled to the land *in corpore* while another is entitled to rights of using it for various purposes, or to rights of taking or sharing certain of the profits derivable from it. Therefore, to complete the treatment of land as subject of property the law regulating these separable and detached incidents will have to be considered.

Accordingly, this Part of the work, dealing with land as the subject of property, will treat,—firstly, of all the elements of use and enjoyment comprised in that complex subject; such are mines and minerals, timber and crops, water and watercourses, buildings, fixtures, and all matters whatever which may appertain to land as the subject of property.—Secondly, of the quantity of use and enjoyment appropriate to the various estates in land, and the restrictions imposed by reason of their limited duration.—Thirdly, of the uses and profits of land which may be separated from the general ownership and held in different property; such are rights of common, rights of way and the other numerous rights of use and profit which may be had or taken in or out of the land of another.

Having discussed the various estates and interests

which may be had in land in general, and all the specific uses which are comprehended in land as the subject of property, the enquiry remains as to the title or the modes of acquiring property in land, or rather, as to the modes of transfer or transmission of property, for it can only be acquired by some process of transfer or transmission. Theories of original acquisition, by virtue of occupancy or otherwise, are purely speculative and obviously have no place in a system which deals with property in the condition of an accomplished institution. In such a system all things are assumed to be already in property, and no scope is left for acquisition by other means than the regular legal processes of transfer.

The transfer of property in land is effected by act of the owner, or by act of law. Transfer by act of the owner is effected either *inter vivos* or by last will. Under the former head it is necessary to show the powers of alienation incident to the various estates in land, and the modes and forms prescribed for exercising them. Under the latter head it is necessary to show the power of testamentary disposition and the formalities prescribed for wills. Transfer by act of law takes effect upon certain occasions, as death, marriage, bankruptcy, execution and process of law and the like, which will require to be enumerated and explained. This Part of the work, therefore, dealing with the Transfer of property in land, will treat of the above matters in order.

There will remain still to be considered the effects on the law of property caused by the personal condition of the owner. The person, as owner of property, has hitherto been considered as a single person *sui juris*, abstracted from the complications of joint ownership and from all the variations of the *status* or condition of the person. The general doctrines of personal *status* and conditions belong to the Law of Persons. But the law of property becomes modified, when applied to persons impressed with such conditions, as also when applied

Transfer of property in land.

Law of persons as affecting property in land

to combinations of interest in a number of persons. These modifications, in a general system of law, might perhaps be properly referred to that department which treats of the Law of Persons ; but in treating the Law of Property in a detached form they require to be noticed in order to make the subject complete. There remains, therefore, a Part of the work, supplementary to the former Parts, dealing with the effects and modifications caused in the law of property by the number and by the special *status* and conditions of persons, as owners.

The scheme of treatment above indicated will, it is conceived, form a convenient and sufficient, if not in all respects scientifically accurate, arrangement for a Digest of the English law of property in land. But in entering upon the matter of that branch of law there occurs at the outset a peculiar difficulty in the way of systematic treatment of any kind, in the circumstance that the sources of the law are not homogeneous. There is no single source or standard of authority to which the law on all points is to be referred, and which can be tacitly assumed on all occasions, as the basis of statement and argument. There exist concurrently several systems, sprung from distinct historical sources, and developed independently through distinct lines of progress ; framed on different technical principles and producing different and in many points contradictory sets of rules ; but which combinedly constitute the English law of real property. These have to be compared and duly subordinated in operation in order to discover the resultant regulative effect.

The various sources here referred to may be summarily enumerated as follows :—

Sources of
English law.

Law of freehold
tenure.

The law of *Freehold tenure*, being the common law of the realm, generally applicable to all land therein.

Law of custo-
mary tenure.

The law of *Customary tenure* applicable to particular lands only, which are commonly known as lands of

customary or copyhold tenure. This law, where it exists, is concurrent with the former, being engrafted upon it by local custom. It is composed in part of general customs applicable to all such lands, and partly of special customs prevailing only in particular places.

Concurrently with the above, property in land has from *Equity*. an early date been regulated by the system of *Equity*, as administered in the Court of Chancery and its branches; which court, while recognising the rules of freehold and customary tenure, has exercised a jurisdiction to control and modify their effect, by compelling the legal owner to deal with the land at law according to the rules and principles of equity.

The system of equity, in its application to land, may again be divided into two periods:—The system of *Uses* *Uses*. or equitable property before the passing of the Statute of Uses. Uses by that statute were converted into legal estates; and the doctrines of uses, after the passing of the statute, became matter of legal cognisance and jurisdiction.—And the system of *Trusts* or modern equitable *Trusts*. property in land, which remains within the exclusive jurisdiction of the Courts of Equity (*a*).

In addition to the above systems or sources of law *Statute law*. there is to be noticed a large body of *Statute law* by which they have been, sometimes collectively, sometimes separately, from time to time, modified and amended.

(*a*) "It is necessary to take notice of the different interests in land at this day. There are three kinds: first, the estate in the land itself, the ancient common law fee. Secondly, the use; which was originally a creature of equity, but since the statute of uses, it draws the estate in land to it; so that they are joined and make one legal

estate. Thirdly, the trust; which the common law takes no notice of, but which carries the beneficial interest and profits in this court, and is still a creature of equity, as the use was before the statute." *Willett v. Sandford*, 1 Ves. sen. 186, per Hardwicke L. C. Compare 1 Hayes Conv. ch. iv. 5th ed. p. 110.

These statutes may, for the most part, be considered and treated as constitutive parts of the systems to which they respectively relate.

In attempting to construct a systematic body of law out of these apparently discordant materials the problem presented is to obtain the compound results of the various sources in the form of positive rules, and to state and arrange them in an uniform style and method. But the rules of law are found so deeply rooted in their peculiar sources and so dependent upon those sources for their relative efficacy that it is impossible entirely to sever the connection or to leave the sources wholly out of consideration. It is impossible, for instance, to give an intelligible exposition of freehold property in land, as it exists, without referring at some length to the principles of feudal tenure and the leading statutes and events which have brought it to its present form. Estates in fee simple and entails can only be understood by referring to their gradual development. It would be useless to mention the name of copyhold or anything concerning it, without entering upon its origin and derivation in history. Laws founded on custom can only be explained by reference to the origin and growth of the custom.

So, likewise, with the distinctive sources and nature of Law and Equity, the changes effected by the Statute of Uses, and many other matters of the like kind. These matters essentially require some extended explanation, and do not admit of a mere statement of results in the form of positive law.

This difficulty, in dealing with what may be described as the historical element, may, it is conceived, be best met by devoting a separate Part of the work to a concise account of the various Sources of the law, sufficient to explain their distinctive origin and character, and their present scope and operation. This Part of the work will be introductory to the subsequent Parts, which may then

be confined, as strictly as the subject will permit, to the body of the law, as it exists at present, with such references only as occasion may require to the sources from whence it is derived.

The work will accordingly be arranged in the following Arrangement of the work into parts.
Parts :—

Part I. The Sources of the law.

Part II. Estates and interests in land.

Part III. Land as the subject of property.

Part IV. Transfer of property in land.

Part V. The law of Persons, as affecting property in land.

The subdivisions of these Parts will appear in the course of the work.

PART I.

THE SOURCES OF THE LAW.

CHAPTER. I. The law of Freehold tenure, as subsisting at common law.

II. The law of Customary tenure.

III. The law of Uses, as incorporated in the common law by the Statute of Uses.

IV. The law of Trusts and equitable property in land.

The Sources of the law of property in land will be treated in this Part in the above order according to the arrangement proposed in the Introduction.

CHAPTER I.

THE LAW OF FREEHOLD TENURE.

Section I. Tenure.

- II. Estates of freehold tenure.
- III. Seisin and conveyance of freehold estates.
- IV. Descent, and disposition by will.

SECTION I. TENURE.

Tenure—subtenure—inféudation—sub-inféudation—statute *quia emptores*.

Manors — demesne land — services—court baron — creation of manors—extinction of manors—reputed manors—customary tenants and customary court.

Services of tenure—Knight service—escuage—special forms of knight service.

Socage tenure—rent service—special forms of socage tenure —burgage—gavelkind—ancient demesne.

Frankalmoign.

Incidents of tenure — homage — fealty—wardship—marriage—relief—berriots—fines—aids—escheat.

Statute 12 Car II., abolishing feudal incidents and converting tenures into common socage.

The law of freehold tenure is derived from the feudal system; it still retains much of its original feudal form, and is expressed in terms and phrases which can be rightly interpreted only by reference to their feudal origin.

The feudal system of property in land, as established Tenure. in England, was based on the theory that all land held by a subject was derived originally by grant from the crown, as sovereign lord or owner;—that land could not be held by a subject in absolute independent ownership, for such was the exclusive prerogative of the crown;—but that all land was held under obli-

gation of duties and services, imposed either by force of law or by express terms of the grant; whereby a relation was constituted and permanently maintained between the tenant and the crown called the *tenure* of the land, characterised by the quality of the duties and services upon which the land was held.

Sub-tenure.

In like manner the tenants of the crown might grant out parts of their land to sub-tenants upon similar terms of rendering services, thereby creating a sub-tenure or relation of tenure between themselves, as *mesne* or intermediate lords and their grantees as tenants; but without affecting the ultimate tenure under the crown as lord *paramount* (a). A tenure without the interposition of any *mesne* lord was called a tenure *in capite* or tenure in chief (b).

Infeudation.

The estate of the tenant in the land was called a feud, fief, or *fee*;—the *infeudation* or grant was effected by the ceremony of *feoffment* or delivery of the land by the lord to the tenant to be held by him upon the terms then expressed or implied;—and the tenant was thereby *invested* with the *seisin* or actual possession of the land (c).

Statute *quia emptores* abolishing sub-infeudation.

The power of sub-infeudation, by which sub-tenures were created, was taken away by the statute *Quia emptores*, 18 Ed. I., c. 1, (A.D. 1290,) which enacted “that from henceforth it shall be lawful to every freeman to

(a) “For the better understanding of that which shall be said hereafter, it is to be known, that first, there is no land in England in the hands of any subject but is holden of some lord by some kind of service. Secondly, all the lands within this realm were originally derived from the crown, and therefore the king is sovereign lord, or lord paramount, either mediate or immediate of all and every parcel of land within the realm. Thirdly, that in ancient time lords upon the creation of their tenures did not only reserve rents, services, and profits, etc., but also took an humble submission of his

tenant by promise and oath to be true and faithful to him for the tenements holden of him, which submission is called homage and fealty, according to the tenure reserved.” Co. Lit. 65 a; Hargrave’s note (1) Ib.; Co. Lit. 1 a, 92 b; Butler’s note to Co. Lit. 191 a, V. “This universality of tenure is peculiar to England.” Ib.

(b) Co. Lit. 108 a; Hargrave’s note (3) Ib. It seems that in the absence of proof of *mesne* tenure, it will be presumed to be immediately under the crown. See *Doe v. Redfern*, 12 East, 96.

(c) Co. Lit. 1 b, 9 a.

sell at his own pleasure his lands and tenements, or part of them; so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee by such service and customs as his feoffor held before."

Since this statute no tenant can alien or grant his fee to be held of himself. The statute admitted the right of the tenant to dispose of the fee, but, upon a feoffment being made, the land was to be held by the feoffee of the next superior lord of whom the feoffor held before, and by the same services (*a*).

Before the statute the tenant, though he might by sub-infeudation have created a new tenure of himself as lord, could not transfer or get rid of his own tenure, with its attendant duties and services, without the licence of the lord. The statute, while disabling him from sub-infeudation, enabled him freely and without licence to alien his own tenure (*b*).

The statute extends only to the sale or alienation of the entire fee or estate in the land (*c*.) By aliening the land for a partial or less estate, reserving the ulterior estate in the fee, a species of sub-tenure or imperfect tenure might still be created (*d*).

A grant of land from the crown under the feudal system usually conferred rights of jurisdiction and other sovereign rights or franchises within the territory, by virtue of which it was constituted a *manor*. The larger manors, comprising inferior manors and lordships held of them by sub-infeudation, were, in early times, often called, with some slight distinctions of meaning, *honours* and *baronies*.

In regard to territory, a manor comprised the portions of the fee retained in possession by the lord himself, called the *demesne* lands, *terræ dominicales*, and the por-

Demesne lands and services.

(*a*) Lit. s. 140; Co. Lit. 98 *b*; note (2) *Ib.*, & auth. there cited.
Bradshaw v. Lawson, 4 T. R. 443. (*c*) 18 Ed. I. c. i. s. 3.
 (*b*) See Co. Lit. 43 *a*; Hargrave's (*d*) See *post*, p. 42.

Waste land.

tions granted in fee to tenants by sub-infeudation to hold of the manor by services, *terræ tenementales*, of which the lord retained the seignory and services. There might also be *waste* land, not as yet in occupation, used in common by the tenants of the manor for pasturage and like purposes; but the title remained in the lord, who might from time to time *approve* or appropriate the waste, subject to the rights exercised over it by his tenants.

Court Baron.

In regard to jurisdiction, the manor comprised a court called the Court Baron or Lord's Court, having two distinct branches or courts. The superior or freehold branch of the court was constituted of the tenants holding fees of the manor, who were bound by their tenure to give *suit* or service at the court, as judges; and their jurisdiction extended to pleas concerning the lands thus held of the manor.

The aggregate of these rights and incidents constituted a manor in the legal acceptation of the term; and, accordingly, a manor is described in law as consisting of demesne lands, and seignories and services anciently united thereto, together with the jurisdiction of a court baron; all of which elements are necessary to constitute a perfect manor (*a*).

(*a*) Perkins, s. 670; Co. Lit. 58 *a*, *b*; Co. Cop. s. 31; Spelman Gloss. 'Manerium.' As to the distinction of the demesne lands and the lands in tenure, see Co. Lit. 17 *a*; *Att.-Gen. v. Parsons*, 2 C. & J. 279, and the authorities cited in the judgment. As to the right of the tenants over the waste and of the lord to approve the waste, with and without the consent of the tenants, see *Boulcot v. Winnill*, 2 Camp. 261; *Betts v. Thompson*, L. R. 6 Ch. 732; *Warrick v. Queen's Coll. Ox.* Ib. 716.

Numerous conjectures have been made as to the derivation of the word *manor*. A plausible one is from the French word *mesner* to govern, which Coke notices as most agreeing with the nature of a

manor—"for a manor in these days signifieth the jurisdiction and royalty incorporate, rather than the land or site." Co. Cop. s. 31; approved by Watkins, Cop. p. 7. In this view of a manor it is included in the list of Franchises, the definition of a franchise being,—“a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject.” 2 Blackst. Com. 37. *Manor* has also been derived *a manendo*, as being the seat of the feudal lord. Co. Lit. 58 *a*; Spelman; 2 Blackst. Com. 90. Manors, together with most of the other elements of feudality, are said to have had their commencement, historically, in England in Saxon times. Co. Lit. 58 *b*; and see 1 Spence Eq. Jur. p. 64, and

After the statute *Quia emptores* no new manor could be created. The grant of a fee no longer created a seignory and tenure, for the grantee held of the superior lord and not of the grantor. The lord, therefore, could not create freehold tenants to hold a court baron, which is an essential element in the constitution of a manor. Moreover, manors are sanctioned only by prescription or ancient custom; hence the king himself, though he can create a new tenure, cannot create a perfect manor at the present day (a).

Creation of manors.

A manor may become extinguished, as a perfect manor, by the severance of the demesne lands from the seignory and services of the lands in tenure; as, if the lord transfer to some stranger the services of all his tenants, and reserve unto himself the demesnes; or, if he grant away the demesnes and reserve the services. A manor may also be extinguished by the extinction of the services; as if the lord purchase all the land of the freeholders, or release unto his freeholders all their services (b).

Extinction of manors.

By severance of the demesnes and services.

By extinction of the services.

A manor might also be extinguished by failure of the court baron. Two freeholders of the manor, at least, were necessary to hold the court baron; consequently, if this number of tenants failed, the court could no longer be constituted, and the manor, without a court baron, ceased legally to exist (c).

By failure of the Court Baron.

But in all the above cases of extinction, though the manor no longer exists in its legal integrity, it may continue as a manor *by repute, nomine tantum*; and it may still be attended with such of the rights and incidents

Reputed manors.

authorities there referred to. But they were consolidated into a system of general application at the Conquest. 1 Spence, 90.

(a) Co. Cop. s. 31; see *Bradshaw v. Lawson*, 4 T. R. 443.

(b) Co. Cop. s. 31; *Sir Moyle Finch's Case*, 6 Co. Rep. 63 a.

(c) Co. Lit. 58 a; Co. Cop. s. 31; see *Chetewood v. Crew*, Willes, 614; *Bradshaw v. Lawson*, 4 T. R. 443. The jurisdiction of the Court

Baron in writs of right concerning lands within the manor was expressly abolished by 3 & 4 Will. IV. c. 27, s. 36, and in all other matters the court has been either superseded or fallen into disuse. See a provision for the surrender of manorial courts in which debts or demands may be recovered, 9 & 10 Vict. c. 95 (the County Courts Act), s. 14.

of the original manor as may remain unaffected by the legal extinction (a).

Customary or
copyhold tenants

It may here be mentioned that besides the freehold tenants holding fees of the manor, there is, in many manors, a class of tenants occupying parts of the demesne lands without acquiring fees or freehold estates. They hold under a distinct tenure known as customary or copyhold tenure, which forms the subject of the next Chapter of this Part. Corresponding to which is the customary branch of the Court Baron having jurisdiction over these customary tenancies of the demesne lands. In this branch of the court, the lord or his steward is the judge; and it may still be held though the freehold branch of the Court Baron may have become extinct (b).

Customary Court
Baron.

Court Leet.

Another distinct court frequently existed as a franchise of a manor called the *Court Leet*, exercising a general criminal and administrative jurisdiction within the manor. This court was not a necessary incident of a manor, but appertained to the lord only by special prescription or special grant of the franchise from the crown; its jurisdiction has been wholly superseded by other courts and officers (c).

Services of
tenure.

Tenures were distinguished by the character of the services. The chief distinction of services was between those of a military or protective character, and those of an agricultural or profitable character; on which was founded the corresponding distinction of tenures into knight service, *servitium militare*, and socage, *socagium* (d).

Knight service.

Tenure by knight service originally bound the tenant to attend the king or next superior lord in war. Tenure in chief of the king was, for the most part, of this kind;

(a) Co. Cop. sect. 31; see 6 Co. 64 a, 66 b; *Soane v. Ireland*, 10 East, 259; Watkin's Cop. by Coventry p. 27, n (1), Ib. p. 48; as the right to manorial wastes, Ib.

(b) Co. Lit. 58 a; *post*, Part I. Ch. II. 'Customary Tenure.'

(c) Co. Cop. s. 31; 4 Inst. c. 54; see Kitchen on Courts.

(d) Lit. ss. 118, 119.

if the king granted land in fee without reserving any service, or even by the express words *absque aliquo inde reddendo*, it constituted in law a tenure by knight service (a).

Knight service, depending upon war, was necessarily Escuage. uncertain as to occasion, and, therefore, as to quantity; but upon each occasion of war the lord could only claim attendance for a fixed time. The obvious inconvenience of which system led to a commutation of the personal service of the tenant for a payment in money, called *escuage* or *scutage*; whence arose tenure by escuage as a species of knight service (b). Escuage might be fixed at a certain sum by the terms of the grant; where the escuage was uncertain the parliament acquired the power of assessing it for the occasion (c).

There were varieties of knight service distinguished by special services:—the chief of these was *Grand serjeanty* in which the tenant was bound to some special service in person to the king, as to carry his banner, or his lance, or to lead his army, or the like, or to do some service of honour at his coronation, or to hold some office of his exchequer (d). Special forms of knight service, —grand serjeanty.

Tenure by *Castle guard* was by the service of keeping a Castle guard. castle or part of a castle of the lord, instead of the ordinary military service or escuage (e). Tenure by *Cornage* Cornage. bound the tenant to wind a horn to signal the approach of an enemy, a tenure prevalent in ancient times in the marches of Scotland (f).

(a) Co. Lit. 75 b; *Wheeler's Case*, 6 Co. 6 b; *Lowe's Case*, 9 Co. 122 b.

(b) Lit. s. 95–97.

(c) Lit. s. 97, 120; Co. Lit. ib.

(d) Lit. s. 153; Co. Lit. ib.; see Blount's *Ancient Tenures*, by Beckwith.

(e) Lit. s. 111; Co. Lit. ib.; as to tenure by rent for castle guard, see 4 Co. 88 a, where it appears that rent for castle guard remained pay-

able though the castle had fallen into ruins, but that a service of castle guard in kind would have been suspended until the castle was rebuilt.

(f) Lit. s. 156; Co. Lit. 107 a. See *Pusey v. Pusey*, 1 Vern. 273, where the horn, used as the symbol of tenure, was held to pass with the estate, like title deeds, as an heirloom. Tenure of the king by cornage was a species of grand serjeanty. Co. Lit. 107 a.

Socage tenure.

The services of socage tenure were originally of an agricultural or profitable kind to be rendered on the demesne lands of the lord in manner and quantity specified in the grant. But the chief characteristic of socage tenure, as distinguished from tenure by military services, was that they were certain and fixed; so that all tenures of land by certain and invariable rents and services, though not agricultural, came to be regarded as socage in effect (*a*). "Some tenures in socage are named *a causâ* and some and the greater part *ab effectu*—as having the like effects and incidents as socage hath" (*b*). Thus where escuage was fixed by the grant at a certain sum, the tenure was deemed to be *in effect* the same with socage tenure, by reason of the certainty of the service (*c*).

Rent service.

Mutual convenience led in course of time to a commutation of agricultural services into money payments of fixed amount, retaining the ancient remedies for their punctual observance. They thus became rents or *rent service* attended with the common law remedy of *distress* (*d*). Hence a division of socage tenure sometimes made into *free* socage, where the services were commuted into money rent;—and *villein* socage where the services were to be rendered in kind, as ploughing land, carrying dung, plashing hedges and the like (*e*).

Special forms of socage tenure.

Other forms of tenure were classed under the general term socage, by reason of their certain services and similar general incidents;—as *Petit serjeanty* and *Burgage tenure*:—And some socage tenures had local peculiarities, as *Gavelkind*, and *Ancient demesne*.

Petit serjeanty.

Petit serjeanty was a tenure of the King in chief to yield to him yearly a bow, or a sword, or a lance, or arrows or such other things belonging to war, like a rent, but not to do anything in person; such service was there-

(*a*) Lit. ss. 117, 119; see *Wheeler's Case*, 6 Co. 6 *b*.

(*b*) Co. Lit. 86 *a*.

(*c*) Lit. ss. 98, 117, 119, 120; Co. Lit. 87 *a*.

(*d*) Lit. ss. 119, 122, 213; see Bullen on Distress, p. 4.

(*e*) Co. Cop. s. 18; see *post*, p. 71.

fore socage in effect, and subject only to the incidents of that tenure (a).

Tenure in burgage is the tenure in ancient boroughs Burgage. in respect of tenements held of the king or other lord by a certain annual rent. It is socage in effect, though generally subject to local customs (b).

Gavelkind is the socage tenure existing in the county Gavelkind. of Kent, having some peculiar incidents, of which the most important consists in the partition of the land on descent. All lands in that county are presumed to be of Gavelkind tenure, until the contrary be proved; whence it has been called the common law of Kent (c).

Ancient demesne (*antiquum dominium regis*) consists Ancient demesne. of those manors which, though now perhaps granted out to subjects, were anciently in the property of the crown, and so appear to have been by the record of Domesday Book. In such manors, the Court Baron of the manor had exclusive jurisdiction in all suits concerning lands of the manor held in socage, so that a suit respecting such lands brought in the superior courts might be met by a plea to the jurisdiction (d).

Frankalmoign (*in liberam eleemosinam*) is the tenure Frankalmoign. by which all ecclesiastical persons, as bishops, deans and chapters, archdeacons, prebends, parsons, vicars and the like, being incorporate bodies aggregate or sole, hold lands to them and their successors; they are bound to

(a) Lit. ss. 159, 160, 161; Co. Lit. ib.; see *Wheeler's Case*, 6 Co. 6 b.

(b) Lit. s. 162-165, see *Busher v. Thompson*, 4 C. B. 48; *Beckett v. Leeds*, L. R. 7 Ch. 421.

(c) Lit. s. 265; Co. Lit. 14 a, 175 b; Robinson on Gavelkind, c. ii, v.

(d) 4 Inst. c. 58; *Alden's Case*, 5 Co. 105 a; *Brittle v. Dale*, Salk. 185. *Doe v. Roe*, 2 Burr. 1046; whether a manor is ancient demesne or not is tried by the record of

Domesday. *Doe v. Roe*, 10 East 523; see *post*, Part I. Ch. II., "Customary Tenure." A fine or recovery of such land in the Court of Common Pleas, until reversed, had the effect of destroying the peculiar tenure and rendering the land *frank free* or ordinary socage. The 3 & 4 W. IV. c. 74, ss. 4-6 was passed to remedy the uncertainty of tenure caused by such proceedings being inadvertently taken, and operates by restoring the tenure in certain cases.

divine services, for which, however, they are answerable only to their ecclesiastical superiors, and they owe no fealty or temporal service (*a*). If the tenure were by a *certain* divine service, as to sing a mass on appointed days, to find a chaplain or to distribute alms to the poor, the lord might distrain as for other services certain; but such a tenure is not frankalmoign, for in that tenure no mention is made of the manner or certainty of the service (*b*).

Occasional incidents of tenure.

Besides the above regular services of tenure prescribed by the grant according to the requirements of the lord, other occasional rights and profits accrued to the lord as incidents of the tenure, for the most part by rule of law without special reservation; some being incident to tenure generally, and some to particular tenures only. Of these the following may be mentioned as the most important.

Homage.

Homage and fealty, or fealty at least, were due to the lord by his tenant (*c*). Homage, which included fealty, was an essential incident of knight service and presumptively indicated that tenure, though it might be incident also to socage tenure (*d*).

Fealty.

Fealty was the universal incident of every tenure except tenure by frankalmoign, which owed no temporal service. Whatever services were expressed, fealty was implied; and though no services were expressed, fealty, at least, was due to preserve the tenure. To hold by fealty only was socage tenure. Homage disappeared with knight service; and the formal observance of fealty has long ago become obsolete (*e*).

Wardship.

Wardship entitled the lord, upon the death of a tenant in knight service leaving an infant heir, to have

(*a*) Lit. ss. 133-136; Co. Lit. ib.

(*b*) Lit. s. 137; Co. Lit. ib.

(*c*) Lit. ss. 85, 91; Co. Lit. 65 *a*; where see as to the manner and significance of homage and fealty.

(*d*) Lit. ss. 117, 118; Co. Lit.

67 *b*, 68 *a*, 86 *a*.

(*e*) Lit. ss. 130, 131, 132; *Wheeler's Case*, 6 Co. 6 *b*; *Lowe's Case*, 9 Co. 123 *a*; see *Edmore v. Craven*, Prec. Ch. 574.

the land until his age of 21 years, subject only to the charge of maintaining and educating him; because such heir by intendment of the law was not able to do knight service before that age (*a*). There was no wardship in socage tenure, because the heir might perform the services by his guardian; and for this purpose the next of kin of the heir to whom the fee could not descend was entitled, as guardian in socage, to hold the land until the age of the heir of fourteen, but for the use of the heir, to whom he was bound to account on coming of age (*b*).

The lord was also entitled to the marriage of the infant ward for such value as he could obtain, or to the value of the marriage, and that whether he tendered a marriage or not. The heir might refuse a marriage tendered, subject to satisfying the lord's claim for its value; but if he married without the lord's license, the lord was entitled to double value of the marriage by the Statute of Merton (*c*). Marriage.

Relief was a sum payable by the heir to take up (*relevare*) the fee upon the death of his ancestor. It was common to all tenures by common law without special reservation;—in knight service a fourth part of the annual value, according to the assessment of a knight's fee;—and in socage tenure, one year's rent (*d*). In tenures *in capite* of the king, whether knight service or socage, it took the form of *primer seisin* or first fruits, being one year's profits of the fee (*e*). Relief.

A heriot is a right in the lord upon the death of the tenant to seize his best beast, or, it may be, some other Heriots

(*a*) Lit. s. 103; Hargrave's note (11) to Co. Lit. 88 *b*.

(*b*) Lit. s. 123–125; Co. Lit. 87 *b*; Hargrave's note (13) to Co. Lit. 88 *b*.

(*c*) Lit. ss. 103, 110; 20 H. 3. c. 6; *Palmer's Case*, 5 Co. 126 *b*; *Lord Darcy's Case*, 6 Co. 70 *b*.

(*d*) Lit. s. 112, 126; Co. Lit. 69

b, 76 *a*, 83 *a*, *b*; see Hargrave's note (2) to Co. Lit. 93 *a*.

(*e*) Co. Lit. 77 *a*. When the heir had been in ward, he sued out *livery* or an *ouster-le-main*, which was half a year's profit of his land, instead of a relief, or primer seisin. *Ib*.

chattel, in the name of a heriot. Such right is not of general incidence, but must be claimed either by special custom or by the express terms of the grant; it may be reserved in the form of heriot-service and is then attended, like rent service, with the remedy of distress; in other cases it is only recoverable by seizure, as vesting in the lord immediately upon the death (a). The custom may be that a sum of money be assessed in the lord's court as payable in lieu of the heriot (b).

Fines on alienation.

The tenant originally could not alien his fee without the licence of the lord, for granting which a fine or payment was charged. The Statute *quia emptores*, enabled tenants to alien without licence; but this statute did not extend to the tenants *in capite* of the crown. The claim of the crown was afterwards settled by statute at a reasonable fine, which was adjudged to be one third of the yearly value for licence, and one year's value upon alienation without licence (c).

Aids.

Aids were contributions exacted by the lord to meet his expenses upon the occasions of marrying his daughter, *aide pur file marrier*, and of making his son a knight, *aide pur faire fitz chivalier*. They were incident to both knight service and socage tenure (d).

Escheat.

Escheat may be here mentioned as a right of seignory, though it is not, strictly speaking, an incident of tenure, as it occurs only upon the determination of the tenure. On failure of the heirs designated in the grant of the fee, the land *escheats* or falls back to the lord. The like occurred upon the determination of the tenure by *forfeiture*. Hence it was said "to happen two manner

(a) Co. Cop. s. 24; 2 Wms. Saund. 168, notes to *Lanyon v. Carne*; *Talbot's Case*, 8 Co. 104 b; *Damerell v. Protheroe*, 10 Q. B. 20; *Mayor of Basingstoke v. Bolton*, 1 Drew. 270; 22 L. J. C. 305.

(b) *Parkin v. Radcliffe*, 1 B. & P. 282, 393. As to the multiplication of heriots on division of the tenement amongst several tenants,

see *Garland v. Jekyll*, 2 Bing. 273; *Holloway v. Berkeley*, 6 B. & C. 2. Provision has been made by statute for the extinguishment of heriots at the instance of either lord or tenant. 21 & 22 Vict. c. 94, s. 7.

(c) 18 Ed. I. c. 1, *ante*, p. 19; 1 Ed. III. c. 12; 34 Ed. III. c. 15; Co. Lit. 43 a, b; 2 Inst. 67.

(d) Co. Lit. 76 a, 91 u.

of ways, *aut per defectum sanguinis*, i.e., for default of heir, *aut per delictum tenentis*, i.e. for felony." (a).

The statute 12 Car. II. c. 24, finally put an end to the distinctions of freehold tenures, by reducing them to the one general form of common socage, and by abolishing, with few exceptions, the special services and occasional incidents by which they were characterised (b).

Statute Car. II.
converting
tenures into
common socage.

The statute, entitled "An act taking away the court of wards and liveries, and tenures in capite and by knights service, and purveyance, and for settling a revenue upon his Majesty in lieu thereof" provided as follows:—(s. 1.) "that the court of wards and liveries and all wardships, liveries, primer seisins, and ouster-le-mains, values and forfeitures of marriages, by reason of any tenure of the king or of any other by knights service be taken away and discharged,—and that all fines for alienation, seizures and pardons for alienations, tenure

Wardships, etc.,
taken away.

Fines for aliena-
tion, etc., taken
away.

(a) Lit. s. 4; Co. Lit. 13 a. "In the beginning of feudal tenure, this right was a strict reversion. The grant determined by failure of heirs, the land returned as it did upon the expiration of any less temporary interest. It was no fruit, but the extinction of tenure; it was the fee returned. This holds equally, whether the investiture was to general or special heirs; for, originally, by the feudal law, the tenant could not alien in any case without the lord's concurrence. As soon as a liberty of alienation was allowed without the lord's consent, this right changed its name. It became a sort of caducary succession. Thence the lord was called *tanquam hæres, ultimus hæres, etc.* The resemblance of the lord's right by escheat to the heir's by descent does not hold throughout; and therefore the lord by escheat is in Co. Lit. 215 b, with accuracy considered as assign in law." See Lord Mansfield in *Burgess v. Wheate*, 1 Eden, 227, and see that case at large as to the doctrines of escheat.

Car. II., 1660, the first year of the restoration, was made to operate retrospectively from 24 Feb. 1645 (sect. 1), that being the date from which the feudal seignories had been before suspended by parliament. Scobell's Acts, 1654, c. 9, 1656, c. 4. A similar reform had been presented to parliament by the king in 18 Jac. I. see 4 Inst. 202.

The statute deprived the king, as lord paramount, of valuable rights, forming an important part of his revenue, in recompense for which he was granted an excise on the sale of beer (sect. 14). Mesne lords lost similar valuable rights, but were compensated by being relieved from the services and duties owed to their own next superior lords. The lowest rank of tenants or tenants *paravail*, those in actual occupation of the land, having no seignories to lose, received an unmixed benefit in the relief from the feudal services and duties, taken away by the act, except so far as they contributed their share of the indirect tax, for which this branch of royal revenue was commuted.

(d) This statute, passed in 12

by homage, and all charges incident to tenure by knights service, escuage, and also aide pur file marrier, et pur faire fitz chivalier, be likewise taken away and discharged,—and that all tenures by knights service of the king or of any other person and by knights service in capite and by soccage in capite of the king and the fruits and consequents thereof be taken away and discharged,—and all tenures of any honours, mannours, lands, tenements or hereditaments of any estate of inheritance at the common law, held either of the king or of any other person, are hereby enacted to be turned into free and common soccage to all intents and purposes.”

Tenures by knight service taken away.

All tenures turned into common soccage.

All tenures hereafter created to be common soccage.

Sect. 4 enacted “that all tenures hereafter to be created by the king, his heirs or successors, upon any gifts or grants of any mannours, lands, tenements or hereditaments of any estate of inheritance at the common law shall be in free and common soccage, and shall be adjudged to be in free and common soccage only, and not by knights service or *in capite*.”

Saving of rents, heriots, suits of Court, fealty etc.

Sect. 5 expressly provided that the act “shall not take away any rents certain, heriots or suits of court belonging or incident to any former tenure now taken away or altered by virtue of this act, or other services incident or belonging to tenure in common soccage,—or the fealty and distresses incident thereunto, and that such relief shall be paid in respect of such rents as is paid in case of a death of a tenant in common soccage.”

Fines by custom of manors.

Sect. 6 provided that the act “shall not take away any fines for alienation due by particular customs of particular manors and places, other than fines for alienation of lands, and tenements holden immediately of the king *in capite*.”

Saving of frank-almoigne, copyhold, and honorary grand serjeanty.

Sect. 7 provided “that this act shall not take away tenures in frank almoigne or subject them to any greater or other services than they now are, nor alter or change any tenure by copy of court roll or any services incident thereunto, nor take away the honorary services of grand serjeanty.”

The statute, it has been justly observed, uses very inaccurate language and undistinguishing modes of expression, especially in the title and enacting clause, as to taking away tenure *in capite*. The intention and effect is to take away such tenures so far only as they varied from common socage, by converting them into common socage, and not “to annihilate the indelible distinction between holding immediately of the king, and holding of him through the medium of other lords.” (a)

The statute retained the principle of tenure and left untouched the rules of freehold tenure as regards the estate of the tenant, and the formal modes of conveying, — which matters are treated in the following sections of this Chapter.

SECTION II. ESTATES OF FREEHOLD TENURE.

The feudal estate—extended to heirs—restricted to heirs of the body—title of heir by grant—by descent.

Fee simple at common law—limitation to heirs.

Estate for life—followed by limitation to heirs—Rule in Shelley’s case.

Fee simple conditional—fee conditional upon issue—ancient instances of fee simple conditional—effect of the statute *Quia emptores* upon such limitations.

Fee tail under the statute *De donis*—efficacy of Fines and Recoveries in barring entails—Fines and Recoveries abolished and new mode of disentailing substituted—base fee.

Reversion—remainder—no reversion or remainder after fee simple—tenure of tenant to reversioner—services, etc., incident to reversion.

Freehold estates.

Lease for years—estate and tenure of lessee—leaseholds and chattels real are personal estate.

The fee or feudal estate in the land appears to have been granted, in early times, for the life of the tenant The fee or feudal estate.

(a) Hargrave’s note (5) to Co. Lit. 108 a, and notes Ib. 85 a, 93 b.

Grant extended
to heirs.

only, the land reverting to the lord upon a vacancy by death. The grant was afterwards extended to the sons and other issue of the tenant under the designation of heirs, leaving no reversionary interest in the lord except upon the failure of the heirs so designated (a).

Heirs general.

A grant extending to the heirs was originally confined to the issue or lineal descendants of the first feudatory. Upon his death without issue, his brothers and other collateral relations acquired no claim under such grant; but upon the death of a tenant who had acquired the fee as heir, his collateral relations might succeed as being heirs of the original feudatory. In the former case the fee was distinguished as *feudum novum*; and in the latter, as *feudum antiquum*. The fee might be enlarged in its creation to all the heirs, collateral as well as lineal, by granting the *feudum novum* expressly to be held *ut antiquum*; and such appears in later times to have become the general construction of a grant even without that express addition; at least, in the English common law a grant "to a man and to his heirs" simply, was construed as extending to the heirs general, collateral as well as lineal.

Grant restricted
to the heirs of
the body.

This extension of the term heirs at the same time necessarily required that the restriction of the fee to the lineal heirs, if intended, should be expressed in terms; such grants were accordingly made with the limitation "to the heirs of the body." Similarly, the grant might be restricted "to the heirs male of the body," or to the heirs by a certain wife, or to other restricted lines of issue (b).

(a) Wright's Tenures, p. 14; 2 Blackst. Com. 55, citing Liber Feud.; Butler's note to Co. Lit. 266 b. "Most of those who have written upon the feudal system, lay it down that benefices were originally precarious and revoked at pleasure by the sovereign; that they were afterwards granted for life; and at a

subsequent period became hereditary. No satisfactory proof, however, appears to have been brought of the first stage in this progress." Hallam's Middle Ages, Chap. ii. and note ib. See 1 Spence Eq. Jur. 45.

(b) Wright's Tenures, 16-18, 186; 2 Blackst. Com. 221, 222, 229; see *post*, Part II. Chap. I. 'Fee tail.'

The heir originally derived his title to the fee from the grantor by designation in the grant, *per formam doni*. But as the tenant acquired, in course of time, the power of alienating the fee, the interest of the heir became reduced to a mere expectation of succeeding, in the event of the ancestor not exercising that power. The additional grant "to the heirs" was then referred wholly to the estate of the ancestor, as importing merely an estate of inheritance, an essential incident of which was the power of transferring the land to another for a like estate; and the heir no longer claimed as grantee by designation in the grant, but derived his title from the ancestor by descent (a).

Title of heir by grant,—

by descent.

Such was the ultimate state of the fee simple or estate of inheritance at common law. It conferred the largest rights of use and enjoyment allowed by law, together with the largest power of alienation. A grant in fee simple left no estate or interest in the grantor, except the rights of seignory appertaining to the lord by the rules of tenure, amongst which was the right of escheat, whereby the lord was entitled to resume the possession of the land upon the death of a tenant without heirs. But even these rights could not be reserved after the statute *Quia emptores*; for by the effect of that statute the new grantee held directly of the same lord as the grantor held before (b).

Fee simple at common law.

Ultimately also the limitation "to the heirs," became the technical description of an estate of inheritance, which could not be legally expressed by any other means (c).

Limitation "to the heirs."

(a) See *ante*, p. 32. According to Coke—"the ancestor during his life beareth in his body (in judgment of law) all his heirs, and therefore it is truly said, that *hæres est pars antecessoris*. And this appeareth in a common case, that if land be given to a man and to his heirs, all his heirs are so totally in him, as he may give the lands to

whom he will." Co. Lit. 22 b; *Burgess v. Wheate*, 1 W. Bl. 133; 1 Eden. 191, see judgment of Clarke, M. R. and authorities there cited. Butler's note to Co. Lit. 191 a, V. 3; and to Co. Lit. 266 b.

(b) Lit. ss. 1, 11; Co. Lit. 13 a; *Burgess v. Wheate*, *supra*.

(c) Lit. s. 1; Co. Lit. 9 a. Words importing the power of

Estate for life.

A grant to a person simply without extending it in terms "to his heirs," and without any other limitation of the estate intended, continued to be construed according to its primitive force and effect, as conferring an estate only for the term of his life (*a*).

Estate for life followed by limitation to heirs.

The grant "to A. and to his heirs," and a grant "to A. for life and after his decease to his heirs," according to the primitive force and effect of the expressions, were manifestly identical; inasmuch as they both conferred life estates upon A., and upon the persons designated as his heirs in succession. They were still construed as identical, notwithstanding the change in the position and interest of the heir consequent upon the enlarged power of alienation in the ancestor; the limitation "to the heirs," in both cases, ceased to confer directly any estate upon the persons answering to that designation, and was referred to the estate of the ancestor, which, though expressed to be in the first place for life, it enlarged to an estate of inheritance, so that the heir took only by descent. This is the origin and simplest form of the rule in *Shelley's* case, an ancient rule of great importance in construing the limitations of estates, which will be noticed more fully hereafter (*b*).

Rule in *Shelley's* case.

alienation appear to have been added in feoffments, when that power became recognised; and that power may perhaps originally have depended upon their insertion; the earlier feoffments given in Madox *Formulare Anglicanum* do not contain any such expressions. After a period not clearly defined, from the early charters not bearing dates, they seem to run either with or without phrases like the following:—"Et hæredibus suis vel suis assignatis," "vel quibus assignare voluerit," "vel cuicumque dare voluerit," "vel hiis quos loco suo constituerit," "et hæredibus suis quos voluerit hæredes constituere," etc. Madox *Form. Diss.* p. v. Forms 308-331. The word "assigns" is still often added;

but where it follows sufficient words of limitation, it merely imports the power of alienation legally incident to the estate and is superfluous; where used alone it may be operative in giving a power of appointment. *Quested v. Michell*, 24 L. J. C. 722; see *Brookman v. Smith*, L. R. 6 Ex. 291, 306; 40 L. J. Ex. 161, 170. The express mention of "assigns" appears to have had some operation in extending the effect of warranties and covenants, see Bracton. 17 *b*.

(*a*) *Ante*, p. 31; Wright's *Tenures*, p. 152; Litt. ss. 1, 283; Co. Lit. 9 *b*, 42 *a*.

(*b*) 1 Hargrave's *Law Tracts*, p. 572; 1 Co. 104 *a*, in *Shelley's Case*; see *ante*, p. 33.

At the common law all inheritances were fee simple in respect of the rights and powers of the tenant. In respect of duration, they might be absolute or conditional, that is, determinable by some conditional limitation (a). Fee simple conditional.

A fee limited to a person and "to the heirs of his body" or "to the heirs male of his body" or in other form of restricted inheritance was a fee simple conditional at common law. It was determinable by failure of the line of issue designated to succeed, and the land reverted in possession to the grantor or his heirs. But the restriction upon the duration of the fee, did not, at common law, otherwise affect the rights and powers of the tenant; and in respect of these it remained a fee simple. So long as the fee lasted the tenant for the time being had all such powers, including the power of alienation, as were the inseparable incidents of an estate of inheritance (b). Only it was adjudged to be a necessary condition of the full effect of his alienation, so as to bar not only his issue, but also the possibility of reverting to the grantor, that he should have heritable issue:—"the gift to one and to the heirs of his body was construed, for the purpose of alienation, to be the same as a gift to him and to his heirs, if he had heirs of his body" (c). Fee simple conditional upon issue.

(a) Co. Lit. 1 b, 18 a; 10 Co. 97 b; Plowden, 235, 245, 557, 562. There is a third kind, a *qualified or base fee*, not at common law, but resulting from certain modes of alienation by tenant in tail since the statute *de donis*; these are noticed hereafter. Ib.; see *post*, p. 40.

It seems necessary here also to notice that conditions might be annexed to grants, reserving to the grantor the right of entry to defeat the grant upon breach of the condition; but such conditions of re-entry operated differently from a conditional limitation. The fee simple conditional is determined by intrinsic force of the limitation; but a condition, strictly so called, renders the estate void-

able only and not void. It may be avoided by an entry for breach of the condition; but until entry the estate continues. Conditions of this kind were implied in tenure, and might be imposed by express terms in the grant. They require no further notice at present, but will be treated hereafter as part of the existing law. See *post*, Part II. Chap. I. Sect. V. 'Conditions.'

(b) Lit. s. 13; Co. Lit. 18 a.

(c) Plowden, 235, and see Ib. 245, 247, 250; Co. Lit. 19 a; Butler's note (1) to Co. Lit. 326 b. It may be observed that the condition thus constructively precedent to the power of alienation, was independent of the conditional limitation of the estate, whereby it was

Ancient instances of fee simple conditional.

Other ancient instances are cited of fees simple conditional, as :—a fee limited to A. and to his heirs for so long as the church of St. Paul shall stand (a);—to A. and to his heirs, tenants of the manor of Dale (b);—to A. and to his heirs, so long as A. or B. has heirs of his body (c).

Cannot be created since statute *quia emptores*.

But the statute *Quia emptores* by preventing the creation of any tenure between the grantor and grantee, where the fee was granted subsequently to the statute, put an end to any right of reverter upon such grants. Before the statute, upon the determination of the fee by the conditional limitation, the land reverted to the grantor by way of *escheat*; for, the grant having conveyed the whole fee, there was no reversionary *estate* left in the grantor to entitle him to the possession. But under such a grant made after the statute there could be no seignory created to which an *escheat* would be incident; and *escheat* to the superior lord could not occur until failure of the original tenure, the terms of which were not altered by the alienation of the tenant (d).

The power of alienation incident to a fee simple con-

determinable upon the failure of the issue of the donee, if the power of alienation were not exercised.

(a) Plowd. 557.

(b) Co. Lit. 27 a.

(c) Plowd. 557; 10 Co. 97 b; and see similar examples cited in 2 B. & C. 202, *Earl of Cardigan v. Armitage*; Shepp. Touch. 101; 1 Sanders on Uses, 201, 4th ed.

(d) 1 Sand. Uses, 200, citing 2 And. 138, as an accurate expression of the law :—"that if the land be given to one and his heirs, *so long as J. S. and his heirs shall enjoy the manor of D.*, those words *so long* etc. are entirely void and idle, and do not abridge the estate;" adopted also in 3rd Report of Real Property Commissioners. The statement in Plowden, 557, "that the feoffor shall have the land again" must refer to feoffments made before

the statute.

In a recent case (*Collier v. M'Bean*, 34 Beav. 426; 34 L. J. C. 555; 35 Ib. 144) a will was construed as giving to trustees an estate in fee determinable on payment of debts and legacies and the death of a person; but upon the same will coming again before the court, this construction was abandoned by counsel and was emphatically condemned by Jessel, M. R. who said,—"No such determinable fee was ever heard of; and it appears to me that the whole decision was founded on a simple misapprehension of what the law as to real property is when applied to such devises as we are now dealing with. There is not an authority to be found for any such determinable fee." *Collier v. Walters*, 43 L. J. C. 216; L. R. 17 Eq. 252.

ditional upon issue, whereby the tenant was enabled to bar his heirs and also the right of escheat or reverter in the lord, was wholly taken away by the statute *De donis*. This statute was passed, it seems, chiefly for the purpose of securing the reversionary interest of the lord, which was obviously more important in the case of a fee restricted to issue than in the case of a fee extended to the heirs general.

The statute, 13 Ed. I. West. 2d., 1285, commonly known as the statute *De donis conditionalibus*, c. 1, after a preamble to the effect, that under such grants or gifts upon condition, to a person and the heirs of his body, it was a grievance to the donors and their heirs that the will of the donor expressed in the gift was not observed, but that, after issue begotten, the donees had power to aliene the land and to disherit their issue, and to bar the donors of their reversion, which was manifestly contrary to the form of the gift, proceeds to enact "that the will of the giver according to the form in the deed of gift manifestly expressed, shall be from henceforth observed, so that they to whom the land was given under such condition, shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail" (a).

The statute in taking away from the tenant the power to alien the land, deprived his estate of that incident which chiefly characterised it as a fee simple. It was, therefore, no longer classed as a fee simple conditional, but it was recognised to be a new kind of fee or inheritance created by the statute, and thenceforth distinctively known as a *fee tail* (b). "Where an estate to one and to the heirs of his body was a fee simple before the

(a) The statute gives a new remedy to the heir by a writ called a *formedon in descender*, and recites that "the writ whereby the giver shall recover when issue faileth, is common enough in the Chancery."

The latter was the writ of *formedon in reverter*. These writs were abolished, together with other real actions, by 3 & 4 Will. IV. c. 27, s. 36.

(b) Lit. s. 13.

statute, now since the statute it is taken that he has but a fee tail, and this is included in the statute although it is not expressed;—for when the statute restrained the donee from alienating the fee simple, or from doing other acts which he that has a fee simple may do, it was presently taken that the fee was not in him, for it would be idle to adjudge it in him, when he could not do anything with it, and therefore it was taken, by collection and implication of the Act, that the fee simple continued in the donor. So that he has one inheritance, viz. a fee simple, and the donee has another inheritance of an inferior degree, viz. a fee tail. And immediately upon the making of the Act it had this name given it” (a). It was so called from the inheritance being cut down, *talliatum*, to the line of heirs designated (b). The name was used for a restricted inheritance before the statute; but since the statute it is used distinctively for the new estate thereby created.

Inheritances not within the statute *de donis*.

The limitation of an estate to a person and “to the heirs of his body,” when applied to subjects of heritable property to which the statute *De donis* does not extend, is construed, as at common law, to give a fee simple conditional upon issue;—for example, when applied to land of copyhold or customary tenure where there is no custom of entail,—or to an annuity in fee. Consequently, in such cases, the grantee, upon having issue, has the same power over the property as if seised in fee simple absolute, but there is a possibility of reverting to the grantor upon the failure of issue (c).

Efficacy of Fines and Recoveries in barring entails.

The statute by taking away the power of alienation from the tenant in tail fixed the land in perpetuity in the line of issue designated in the grant. The fee tail remained thus inalienable for about two centuries, when the

(a) Per Dyer, C. J., Plowden 251, in *Willion v. Berkley*; Plowden 562, *Walsingham's Case*; Co. Lit. 22 a; Butler's note (2) to Co. Lit. 327 a.

(b) Ib.; Lit. s. 18.

(c) Co. Lit. 20 a; *Earl Stafford v. Buckley*, 2 Ves. sen. 170, 180; *Doe v. Clark*, 5 B. & Ald. 458; *Doe v. Simpson*, 4 Bing N. C. 333; 3 M. & G. 929.

Judges recognised the efficacy of *Recoveries* in conveying the land, and thereby restored in effect the power of alienation. *Recoveries* and *Fines*, which were subsequently used for the same purpose, were collusive legal proceedings concerning the land, brought for the purpose of settling the title under the process and judgment of a Court of Justice. The proceedings were entered upon the records of the Court and, with some aid from statutes, became available as common forms of conveyance (a).

A Fine was originally the compromise of an action concerning the land whereby the title was acknowledged and finally confirmed by the agreement of the parties, *finalis concordia*. A fine levied by tenant in tail, whether in possession, or in remainder, or merely as heir in expectancy, was effectual to bar all his issue in tail; but it was not alone effectual to bar estates or interests limited to take effect after or in defeasance of the estate tail. The efficacy of a fine rested principally upon the Statute of Fines, giving a conclusive force to a fine with proclamations (b).

A common recovery was originally a real action in which the land in question was recovered by judgment of the court. A recovery suffered by tenant in tail was effectual to convey a clear fee simple discharged of the estate tail and of all the estates and interests limited to take effect after or in defeasance of the estate tail. But it was an essential ground of this proceeding that the writ or *præcipe* should issue against the actual tenant of the freehold; consequently it could not be carried out without his concurrence. The efficacy of a recovery rested principally upon the decision in *Taltarum's* case (c).

The process of barring estates tail by Fines and Recoveries was abolished by the statute 3 & 4 Will. IV., c. 136. Fines and Recoveries abolished, and new mode of disentailing substituted.

(a) See *Jenning's Case*, 10 Co. 107; Co. Lit. 121 a; 372 a; 44 a; *Martin v. Strachan*, 5 T. R. 107 b.

(b) 4 Hen. 7, c. 24; explained by 32 H. 8, c. 36; see 1 Dyer, 3 a; *Martin v. Strachan*, 5 T. R. 107; Co. Lit. 121 a; 372 a; 1 Hayes Conv. 5th ed. 138.

(c) Year Book, 12 Ed. IV, f. 19 (1473); see 6 Co. 40; *Martin v. Strachan*, 5 T. R. 107; 1 Hayes Conv. 143.

74, s. 2; and by the same Act a general power was given to tenants in tail to dispose of the lands entailed for an estate in fee simple absolute, or for any less estate, to be exercised in the manner and with the consents and subject to the restrictions contained in the Act (a).

Base fee.

A fine by barring the issue in tail only, and not the estates subsequently limited, conveyed what was called a *base fee*, an estate of the quality of a fee simple and descendible to the heirs general of the grantee, but determinable by failure of the issue in tail, upon which event the subsequent limitations took effect (b).

By the Act for the abolition of Fines and Recoveries, 3 & 4 Will. IV, c. 74, s. 1, "The expression '*base fee*' shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred." Such an estate is created by a disentailing deed under the statute, when executed without the required consent of the protector of the settlement (c).

Reversion.

If a tenant in fee simple granted to another for a term of life, the alienation of the fee was partial only, in respect of duration of time, the residue being left in the grantor; and upon the determination of the estate for life, the possession reverted or returned to him or to his heirs; whence the residuary estate left by such conveyance was called a reversion, and the estate for life was called, in relation to the reversion, a *particular* or partial estate. A reversion is defined as "that estate which the lessor has after the possession is conveyed to and vested in another during a particular estate" (d).

Particular estate.

(a) See *post*, Part IV. Chap. I.
(b) Plowden, 555, 558; Co. Lit. 18 a; *Seymour's Case*, 10 Co. 95 b.

(c) See the statute and see *post*, Part IV. Ch. I.

(d) Plowd. 196, and see *Ib.* 151.
"A reversion is where the residue of

the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as where tenant in fee simple maketh a gift in tail or a lease for life or for years." Co. Lit. 22 b; and see *Ib.* 142 b.

So, upon a gift in fee tail after the statute *de donis* there was a reversion in the donor secured to him by the statute, and upon the death of the tenant in tail without issue, whereby the fee tail was determined, the possession reverted to the donor or his heirs. "In every gift in tail without more saying, the reversion in fee simple is in the donor" (a). "This is wrought by the construction of the statute, which hath turned the fee simple of the donee into a particular estate of inheritance, and the possibility of the donor to a reversion in him expectant upon the estate tail, so as there be two inheritances of one land" (b).

Reversion after
fee tail.

A tenant in fee simple might grant a particular estate, whether for life or in tail, to one person, and at the same time grant the residue or *remainder*, technically so-called, of the fee to another, leaving no reversion in himself. A remainder is defined to be "a residue or remnant of an estate in land, expectant upon a particular estate created together with the same at one time" (c). So he might grant several particular estates successively in remainder, leaving the reversion in himself, or at the same time granting away the ultimate remainder in fee without leaving any reversion.

Remainder.

The grant of an estate in fee simple exhausted the power of the grantor; no reversion was left nor could any remainder be limited after such estate. On the determination of a fee simple for want of heirs, *per defectum sanguinis*, the land fell back to the lord by right of escheat, which was not an estate in the land, strictly so called, but a right incident to the seignory (d). A fee simple conditional at common law was equally extensive in this respect, and left no reversion or residue at the disposal of the grantor. "One fee simple cannot depend upon another by the grant of the party; as if lands be

No reversion or
remainder after
a fee simple.

(a) Lit. ss. 18, 19.

(b) Co. Lit. 22 a; ante, p. 37.

(c) Co. Lit. 49 a, 143 a.

(d) See ante, p. 28.

given to A., so long as B. hath heirs of his body, the remainder over in fee, the remainder is void" (a).

Tenure between
tenant and rever-
sioner.

The grant of a partial or particular estate only, as an estate for life or an estate tail, created a relation of tenure between the tenant of the particular estate and the reverser, to which fealty and services were incident according to law or the express reservation of the grant. The statute *Quia emptores*, which abolished sub-infeudation, was expressly confined to alienations of the fee simple and did not affect this tenure of particular estates to the reversion, which may still be created. It has been called an *imperfect tenure*, as distinguished from the perfect tenure incident to the seignory of the fee, in which the rent and services are incident to the seignory; in the imperfect tenure they are incident to the reversion (b). A grant of a particular estate and at the same time of the remainder in fee, retaining no reversion, is within the statute *Quia emptores*; no new tenure is created and both the grantee of the particular estate and of the ultimate remainder hold immediately of the lord of whom the grantor held before (c).

Imperfect
tenure.

Services, etc., in-
cident to rever-
sion.

If a man make a gift in tail, without any express reservation, the donee holds of the donor by the same services as the donor holds of the next superior lord; as was the case with a grant in fee simple conditional at the time of the passing of the statute *De donis*; and before the statute the donee held of the donor as of his person, but since the statute he holds of him as of his reversion. If a man make a lease for life and reserve nothing, he shall have fealty only, though the lessor hold over by rent or other services. But if in such cases there be made a special reservation of rent or services,

(a) Co. Lit. 18 a; 10 Co. 97 b, *Seymor's Case*; Plowd. 235, 239, 249, in *Willion v. Berkley*; *Doe v. Simpson*, 4 Bing. N. C. 333; 3 M. & G. 929. But as to the creation of a *base fee*, see *ante*, p. 40.

(b) 18 Ed. I. (*Quia emptores*) s. 3; *ante*, p. 19; Lit. ss. 19, 132, 214; Co. Cop. s. 31, Tracts, p. 48.

(c) Lit. s. 215, 216, 217; 2 Inst. 505; Butler's note (2) to Co. Lit. 327 a.

the terms of the tenure are regulated by the express reservation (a). The fealty and other services are incident to the reversion and pass with it; the fealty inseparably, but the services are separable. The reversion, in respect of the fealty, rent or other services reserved or incident thereto, is a present and immediate interest; though in respect of the possession of the land it is future (b).

Estates for life and estates of inheritance, being the estates admissible at common law in land of freehold tenure, are called *freehold estates*. An estate for life is sometimes called specially an estate of freehold, or *the freehold*, as distinguished from the inheritance, which in this sense includes the freehold (c).

Freehold
estates.

“The word freehold is now generally used to denote an estate for life, in opposition to an estate of inheritance. Perhaps, in the old law it meant rather the latter than the former. It is known that fees were held originally at the will of the lord; then, for the life of the tenant; that afterwards they were descendible to some particular heirs of the body of the tenant; then, to all the heirs of his body; and that in succession of time the tenant had the complete dominion or power over the fee. The word *freehold* always imported the whole estate of the feudatory, but varied as that varied” (d).

Thus the term freehold is used to denote the quantity or duration of estates as well as the tenure of the land; and, as applied to estates, even a customary tenant or copyholder may be said to have a freehold. “A tenant in fee simple, fee tail, or for life is said to have a freehold interest, whatever his *tenure* may be; but none except he who holds or did hold by knights service, in

(a) Co. Lit. 23 a, 143 a; Co. Lit. 151 b.

(b) Plowd. 197.

(c) Lit. s. 57.

(d) Butler's note to Co. Lit. 266 b; see *ante*, p. 32.

free socage, or in frankalmoign can be said to have a freehold tenure." (a).

Lease for years. A lease for a term of years or any certain duration of time was originally considered at common law not to convey any estate in the land. The tenant or termor, though *de facto* in possession, was considered to hold the land in the name and on behalf of the freeholder who let him into possession, and who through him still retained the possession in law. He was in the position of an agent or bailiff entrusted with the possession (b).

His right was founded on the lease or contract which entitled him to enter and occupy during the term and upon the conditions agreed upon; and if ejected or disturbed in possession it gave him a personal action for the breach of contract, but no remedy by real action in respect of the land itself. A recovery in a real action against the freeholder defeated the possession of the termor by establishing a title paramount to that under which the possession was given; and even a recovery suffered by the collusion of the lessor had the same effect, until a statute was passed enabling termors to falsify recoveries under feigned titles (c).

Estate of lessee. In course of time the interest of a lessee for years, after it was perfected by entry, came to be recognised and protected in other respects as an estate in the land. In the personal action of ejectment, judgment was given for the recovery of the term, with a writ of possession. The doctrines of tenure were extended to it, so that the lessee was bound to fealty, and the rent reserved became rent service recoverable by distress. The right of the lessee for years before entry was called an *interesse termini* (d).

**Interesse
termini.**

(a) Blackstone on Copyholders, Tracts, p. 223; Co. Lit. 43 b; Co. Cop. ss. 14, 15, 16, 17.

(b) Butler's note to Co. Lit. 330 b.

(c) 21 Hen. VIII., c. 15.

(d) Lit. ss. 58, 132, 214; Co. Lit. 46 a, b. "Till the reign of Edward IV. the possession was not recovered in an *ejectione firme*; but

But the estate of the termor or leaseholder has never ceased to be considered, like the lease or contract upon which it is founded, of the nature of personal property. It passes, as such, to the executor or administrator, and not, as real estate, to the heir. Such estates are called *leasehold* in contrast to *freehold*. They are called *chattel* interests, as being personal estate, and also chattels *real*, the subject of property being land or realty, to distinguish them from goods or chattels strictly *personal* (a).

Leaseholds or chattels real are personal estate.

SECTION III. THE SEISIN AND CONVEYANCE OF FREEHOLD ESTATES.

Seisin—feoffment by livery of seisin—livery for particular estate and remainder—limitations shifting the seisin.

Rule against abeyance of seisin—future limitations—contingent remainders.

Possession of leasehold—lease for years—lease for years with remainder of freehold—lease to commence *in futuro*.

Deed of feoffment—statutory requirements of feoffment.

Freehold now lies in grant—rules of limitation in grants—limitation to grantor or his heirs, at common law—creates a new title by statute.

Things lying in grant—reversions and remainders—incorporeal hereditaments.

Attornment to grant at common law—abolished by statute.

Release—conveyance by lease and release.

Disseisin—conveyances having tortious operation.

Rights of entry and of action.

In the common law of freehold tenure seisin signifies the possession of the fee or freehold estate; the freeholder was described in law as *seised*, or invested with the seisin. The tenant in the actual possession or seisin

Seisin of the freehold.

only damages." Hale, Hist. Com. Law, 201. See 3 Blackst. Com. 200.

(a) Co. Lit. 118 b; Lit. s. 740. But though personal property by English law, a leasehold interest is not, therefore, moveable property

within the international maxim *mobilia sequuntur personam*; and, accordingly, it is regulated by the *lex loci rei sitæ* and not by the law of the domicile. *Freke v. Carbery*, L. R. 16 Eq. 461.

was presumptively seised of an estate in fee simple. If entitled only for a particular estate, he held the seisin not only in his own right, but also in right of all the estates in reversion or remainder under the same title; the owners of which participated in the seisin in order of succession, and were described as seised in reversion or in remainder; for the actual seisin represented the fee, or all the estates into which it might be subdivided (*a*).

Feoffment by
livery of seisin.

The seisin, as representing the fee, was also used as the means of conveyance. Feoffment or the conveyance of a freehold estate was effected by *livery of seisin*, that is, by an actual delivery of possession. This originally constituted the efficient and essential act of conveyance, words being required only to explain the act, and, when necessary, to limit and direct the estates for which it was intended the seisin should be held (*b*).

Feoffment for
particular estate
and remainder.

A feoffment might be made with an express appropriation of the seisin to a series of estates in the form of particular estate and remainders, and the livery to the immediate tenant was then effectual to transfer the seisin to or on behalf of all the tenants in remainder, according to the estates limited. But future estates could only be limited in the form of remainders, and any limitations operating to shift the seisin otherwise than as remainders expectant upon the determination of the preceding estate were void at common law. Thus, upon a feoffment, with livery of seisin, to A. for life or in tail, and upon the determination of his estate to B., the future limitation takes effect as a remainder immediately expectant upon A.'s estate (*c*). But upon a feoffment to A. in

Limitations
shifting the
seisin, void.

(*a*) Co. Lit. 153 *a*; Butler's note to Co. Lit. 266 *b*. The term *vest* or *invest*, applied to estates, referred to a participation in the seisin or freehold title, the subject of feudal *investiture*. Ib. Spelman Gloss.

(*b*) Lit. s. 59; Co. Lit. 48, 49; see Ib. 49 *a*, 50 *a*, *b*, as to when

a freehold might pass without livery. Butler's note (1) to Co. Lit. 271 *b*, and to 330 *b*; see *Doe v. Taylor*, 5 B. & Ad. 575; 1 Hayes Conv. 12.

(*c*) "The remainder is good and passeth out of the donor by the livery of seisin; for the particular

fee or for life, and after one year to B. in fee;—or to A. in fee, and upon his marriage to B. in fee;—or to A. in fee or for life, and upon B. paying A. a sum of money to B. in fee,—the limitations shifting the seisin from A. to B. at the times and in the events specified, as they could not take effect as remainders, were wholly void at common law (a). Such limitations became possible in dealing with uses and in dispositions by will, as will appear hereafter.

The exigencies of tenure required that the seisin or immediate freehold should never be in abeyance, but that there should at all times be a tenant invested with the seisin ready, on the one hand, to meet the claims of the lord for the duties and services of the tenure, and, on the other hand, to meet adverse claims to the seisin, and to preserve it for the successors in the title (b).

This rule had important effects upon the creation of freehold estates; for it followed as an immediate consequence of the rule, as also from the nature of the essential act of conveyance by livery of seisin, that a grant of the freehold could not be made to commence at a future time, leaving the tenancy vacant during the interval. “Livery of seisin must pass a present freehold to some person and cannot give a freehold *in futuro*.”—“If a man makes a lease for life to begin at Michaelmas it is void, for he cannot make present livery to a future estate, and therefore in such case nothing passes (c).”

As a consequence of the same rule if a feoffment were made to A. for life and after his death and one day after to B. for life or in fee, the limitation to B. was void, because it would leave the freehold without a tenant or in abeyance for a day after the death of A (d).

estate, and remainder, to many intents and purposes, make but one estate in judgment of law.” Co. Lit. 143 a. See 1 Hayes Conv. 21.

(a) Plowden, 29; 1 Hayes Conv. 19-21.

(b) Co. Lit. 342 b; Butler’s note Ib; see 1 Hayes Conv. 5th ed. p. 12, 14.

(c) Co. Lit. 217 a; 5 Co. 94 b, *Barwick’s Case*.

(d) Plowden, 25; Fearn’s C. R.

Rule against abeyance of the seisin.

Future limitations,—limitation of freehold to commence *in futuro*.

Limitation suspending the freehold.

Remainder in
abeyance pend-
ing the particular
estate.

The seisin or freehold in remainder might be in abeyance during the continuance of the particular estate; for the present seisin of the tenant of that estate was sufficient to satisfy all the requirements of tenure, and it represented and supported all the future estates and interests in the fee.

Accordingly, a remainder might be limited to take effect upon a condition, or in a person not ascertained, as an unborn child, so as to be in abeyance or uncertainty until the condition happened or the person became ascertained. Such a limitation was good and might remain in uncertainty so long as the particular estate continued, as it was supported by the seisin of that estate. But it was essential that it should have become certain and absolute at the time when the particular estate determined; and if not then ascertained, so as to be capable of taking up the seisin, it failed altogether, and the next estate in remainder took immediate effect (*a*).

Contingent re-
mainder.

Vested remain-
der.

A remainder limited to an uncertain person or upon an uncertain condition, and so long as the uncertainty lasted, became known as a *contingent* remainder. A remainder limited absolutely and to a determinate person, or which had become absolute and certain in ownership by subsequent events was a *vested* remainder; the remainderman was presently *invested* with a portion of the seisin or freehold (*b*).

307. "Since the tenancy was not allowed to be vacant or in suspense for an instant, it was essential to the validity of every conveyance of the freehold that it should be made to take immediate effect.—On the same principle, it was essential that all substitutions should be so strictly consecutive as not to leave the feud unprovided with a tenant even for an instant." 1 Hayes Conv. 16.

(*a*) Co. Lit. 342 *b*; 378 *a*; Perkins, ss. 52, 87. "If a man seised of land, lease it to a stranger for life, and grants the remainder over to the right heir of J. S., which J. S. is then alive; in that case the fee is

in abeyance, viz., in the consideration of the law, and is in no certain person." Ib. s. 708. Fearne C. R. 3, 281, 307; "It is a general rule, that every remainder must vest, either during the particular estate, or else at the very instant of its determination." Ib. 307. A contingent remainder, as putting the freehold in abeyance, seems to have been originally regarded as an infringement of feudal principles, and is said not to have been fully recognised until the reign of Henry VI. See Williams Real Prop. 243, 7th ed.

(*b*) See *ante*, p. 46.

The term *seisin* did not apply to the possession of a tenant for years or leaseholder in his own right ; he had no participation in the freehold, and was described in law simply as *possessed*. But his possession, being referred to the title of the freeholder under whom he held, constituted the *seisin*. The freeholder was still described as *seised*, though his *seisin* was subject to the lease for years (a).

Possession of leasehold.

As a lease for years did not import a transfer of the *seisin* or freehold, it required no livery ; and at common law a lease for years might be made by mere parol, without deed or writing. The Statute of Frauds, 29 Car. II. c. 3, s. 1, required all leases to be made in writing and signed by the lessor or his agent ; excepting (s. 2) leases not exceeding three years from the making and on which a rent of two-thirds at least of the full value is reserved. The statute 8 and 9 Vict. c. 106, s. 3, enacted that all leases, required by law to be in writing, must be made by deed (b).

Lease for years did not require livery.

Statute requiring leases to be in writing.

Statute requiring deed.

If a lease were made for years with remainder over to another for an estate of freehold, for life or in tail or in fee, it was necessary for the lessor to make livery of *seisin* to the lessee for years before entry, in order to pass the remainder (c). If the lessee entered before livery, his estate in the term was perfected by the entry and the freehold and reversion was in the lessor ; and livery of *seisin* could not afterwards be made, because the possession was already in the lessee (d).

Lease for years with remainder of freehold.

If a lease were made for years with a contingent remainder of freehold, the limitation in remainder was

Lease for years with contingent remainder of freehold.

(a) Lit. s. 324 ; Co. Lit. ib. ; Butler's note to Co. Lit. 330 b, ante, p. 44.

(b) See *post*, Part IV. Chap. I. 'Conveyances.' Lit. s. 59.

(c) Lit. s. 60. "This livery is not necessary for the lessee himself because he hath but a term of years, but it is for the benefit of them in the remainder : for the livery of the

possession could not be made to the next in remainder, because the possession belonged to the lessee for years." Co. Lit. 49 a.

(d) Lit. s. 60 ; Co. Lit. 49 b, "by the entry of the lessee he is in actual possession, and then the livery cannot be made to him that is in possession, for *quod semel meum est amplius meum esse non potest*."

wholly void, because it left the seisin in abeyance until the happening of the contingency; nor could livery be given for such an estate for want of a present certain grantee of the freehold (a). Thus, "it is a general rule, that wherever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it" (b).

Lease for years
to commence *in*
futuro.

A lease for a term of years might be made to commence *in futuro*, though a grant of the freehold could not; because such lease was merely an executory contract as to the possession, which might be executed at the time agreed upon; "as if a man make a lease for years to begin at Michaelmas next ensuing, it is good" (c).

Deed or char-
ter of feoff-
ment.

A deed or charter of feoffment was generally used to attest the livery of seisin and record the terms of the grant. Livery of seisin was then expressed to be made according to the form of the deed, *secundum formam cartæ*; and a memorandum of such livery was endorsed upon the deed. The deed or charter was not necessary to the feoffment at common law; and in case of variance between the terms of the deed and of the feoffment, the latter as the efficient act prevailed; unless the feoffment was expressly made according to the form of the deed, when the deed regulated the effect of the feoffment (d).

Statutory re-
quirements of
feoffment,—writ-
ing.

The Statute of Frauds, 29 Car II. c. 3, s. 1, first made a writing necessary to a feoffment by enacting "that estates made or created by livery and seisin only, or by

(a) *Ante*, p. 47; Co. Lit. 217 a.

(b) Fearn, C. R. 281.

(c) 5 Co. 94 b, *Barwick's Case*; see *Neale v. Mackenzie*, 1 M. & W. 747, 759; and see *ante*, p. 44. But "if a lease for years be made to begin at Michaelmas the remainder over to another in fee, if the lessor make livery of seisin before Michaelmas, the livery is void, because if it should work at all it must take effect presently and cannot expect." Co. Lit. 217 a.

(d) Co. Lit. 6 a, 7 a, 48, 49, 121 b, 222 b; Lit. s. 359; *Samme's Case*, 13 Co. 54 b. Thus—"If a man make a charter in fee and deliver seisin for life *secundum formam cartæ*, the whole fee simple shall pass."—"If a man make a lease for years by deed and deliver seisin according to the form and effect of the deed, yet he hath but an estate for years and the livery is void." Co. Lit. 48 a.

parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorised by writing, shall have the force and effect of estates at will only." And the statute 8 & 9 ^{Deed.} Vict. c. 106, s. 3, enacted "that a feoffment shall be void at law unless evidenced by deed."

The same statute dispensed with livery of seisin ^{Freehold now lies in grant as well as in livery.} altogether by enacting (s. 2) that "after 1 October, 1845, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery." Since this enactment a deed of grant alone is sufficient to convey freehold estates, and feoffment by livery of seisin may be described as obsolete.

But this enactment has made no alteration in the rules ^{Rules of limitation in grants.} of common law above stated concerning the limitation of estates; and although a deed of grant is now made effectual by the statute to pass the seisin and freehold without livery, it is not thereby made effectual to pass the seisin *in futuro*, or to shift or suspend the seisin, or to leave it in abeyance. The same rules of limitation of estates apply now to a grant of the freehold, as before applied to a feoffment by livery of seisin (a). It is different with a grant operating under the statute of uses to be noticed hereafter (b).

It was impossible for a person to make a direct conveyance to himself, so as to alter his title to his own ^{Limitation to grantor at common law.} property and take as purchaser from himself, by feoffment, grant, or any mode of conveyance known to the common law. The maxim applied "*nemo potest esse agens et patiens*"; he could not be both feoffor and feoffee, or grantor and grantee. So, if upon a feoffment or grant he limited the estate to himself for life, with remainder

(a) See *ante*, p. 47; *Doe v. Prince*, 20 L. J. C. P. 223.

(b) *Post*, Part I. Chap. III. 'Law of Uses.'

to another, the remainder was void for want of a particular estate to support it (*a*). By making a feoffment or grant to another and taking a re-feoffment to himself and his heirs, he could acquire a new title by purchase, which might make an important difference in tracing the descent (*b*).

Limitation
to heirs of the
grantor.

Nor could a person by any common law conveyance make his heir a purchaser, for it was a maxim that *hæres est pars antecessoris*. Thus, if a man made a gift in tail, or a lease for life, with remainder to his own right heirs, the limitation of the remainder was inoperative, being merely descriptive of the reversion remaining in him; so, if the remainder were limited to the heirs male of his own body, this was a void remainder, for the donor could not make his own right heir a purchaser (*c*).

Limitation to
grantor or his
heirs creates
new title by
statute.

By the statute 3 & 4 W. IV. c. 106, (the inheritance Act) s. 3, it is enacted that "when any land shall have been limited by any assurance (executed after 31st December, 1833), to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof" (*d*).

Distinction of
grant and livery,
—things lying in
grant.

The distinction between grant and livery referred to the subject of conveyance. Things incapable of actual possession, of which, therefore, no livery could be made,

(*a*) Per Hale, C. J., in *Pibus v. Mitford*, 1 Vent. 378; *Southcot v. Stowell*, 2 Mod. 210; 1 Sand. Uses, 129. From the principle of the common law that husband and wife are one person, it followed that a husband could not during the coverture by any conveyance at common law limit an estate to his wife. See *post*, Part V. Chap. II.

(*b*) Co. Lit. 12 *b*; *Doe v. Morgan*, 7 T. R. 103. A person may also convey to himself under the Statute of Uses. See *post*, Part. I. Chap. III. 'Law of Uses.'

(*c*) Co. Lit. 22 *b*, "without departing of the whole fee simple out of him." *Greswold's Case*, Dyer, 156 *a*.

(*d*) See 1 Hayes Conv. 315.

were said to *lie in grant*, that is to say, were conveyed by a deed of grant (a).

Reversions and remainders, being incapable of possession during the continuance of the particular estate, were not the subject of livery, but were conveyed by deed of grant (b). If the tenant of the particular estate and the reversioner joined in a feoffment, though without deed, it was supported by means of an implied surrender of the particular estate to the reversioner preceding the livery by him (c). So, a feoffment by the reversioner to the tenant of the particular estate might be supported by an implied surrender of the particular estate preceding the livery (d).

Reversions and remainders

A grant of a reversion or remainder was subject to the same rules, as to future limitations of estate, as a feoffment of the present seisin. It could not be made to A. from Christmas next, or to A. for life and after his death and one year to B.; but it might be made for a particular estate with remainder, vested or contingent, as to A. for life with remainder to B., or with remainder to the heirs or children of B. not yet born (e).

Future limitations of reversions and remainders.

The class of rights and interests in land known as incorporeal hereditaments, comprising seignories, rents and services, rights of profit or use in the land of another, as rights of common, rights of way and the like, when

Incorporeal hereditaments.

(a) "This word grant is taken largely where anything is granted or passed from one to another, and in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like. But the word being taken more strictly and properly it is the grant, conveyance or gift by writing of such an incorporeal thing as lieth in grant and not in livery, and cannot be given or granted by word only, without deed." Shepp. Touch. 228; and see 2 Sand. Uses, 25; 2 Wms. Saund. 96 b.

6 Co. 15 a, *Treport's Case*; see *Doe v. Lynes*, 3 B. & C. 388; Co. Lit. 48 b.

(d) *Lancastel v. Aller*, Dyer, 358 a.

(e) See *ante*, p. 47; 1 Hayes Conv. 21. "On every conveyance, therefore, whether of the actual possession, or of the present right to the future possession, there must have been an immediate grantee, capable of receiving the transfer; and his substitutes, if any, must have been designated at the same time to succeed continuously as remainder men, in regular order, without any cessation or disturbance of the possession." *Ib.* p. 22.

(b) See *Doe v. Cole*, 7 B. & C. 243.

(c) *Bredon's Case*, 1 Co. 76 a

taken as separate subjects of property and not as incident or appurtenant to other land, being incapable of actual possession or seisin, lie in grant, that is, are conveyed by deed of grant; nor can any estate or interest in them be created except by deed (a).

Attornment to
grant necessary
at common law.

Upon the grant of a manor or seignory to which tenure with rent or other services was incident, attornment or consent of the tenant to hold of the grantee was necessary at common law to give effect to the grant;—so likewise with the grant of the reversion of a particular estate, for years, or for life, or in tail (b). Attornment was described as “an agreement of the tenant to the grant of the seignory, or of a rent; or of the donee in tail or tenant for life or years, to a grant of the reversion” (c).

Grant made
effectual without
attornment by
statute.

Attornment was taken away by the Statute of 4 Anne, c. 16, enacting by sect. 9, “that all grants or conveyances thereafter to be made of any manors or rents or of the reversion or remainder of any messuages or lands shall be good and effectual to all intents and purposes, without any attornment of the tenants of any such manors or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall be expectant or depending, as if their attornment had been had and made.” Sect. 10 provides “that no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor, or by breach of any condition for

(a) Co. Lit. 9 b, 49 a, 121 b, 172 a; *Duke Somerset v. Fogwell*, 5 B. & C. 875; *Gardiner v. Williamson*, 2 B. & Ad. 336; see *post*, Part III. ‘Land as subject of Property.’

(b) Lit. ss. 551, 553, 567, 568. *Higers v. Dean of St. Paul's*, 14 Q. B. 909; 19 L. J. Q. B. 84.

(c) Co. Lit. 309 a; see Butler’s

note(1), Ib. “And the grant of the reversion by deed with the attornment of the lessee, do countervail in law a feoffment by livery, as to the passing of the freehold and inheritance.” Co. Lit. 315 b. The attornment of a tenant could not be compelled even in Chancery. Cary, p. 5.

non-payment of rent, before notice shall be given to him of such grant by the grantor." (a).

A subsequent statute 11 Geo. II. c. 19, s. 11, after reciting that the possession of estates in land is rendered very precarious by the frequent and fraudulent practice of tenants in attorning to strangers who claim title to the estates of their landlords or lessors, enacts that all such attornments of any tenants shall be absolutely null and void, and the possession of their respective landlords or lessors shall not be anywise changed, altered or affected by any such attornments. Attornment to adverse claimant void.

A grant of a reversion or remainder to a person having a prior vested estate in the land was distinguished as a *Release*. Such conveyance, like a grant, required to be by deed under seal, and differed from a grant only in its special effect and operation in enlarging the previous estate (b). Release.

A lessee for years, or even a lessee at will, after entry, might take the freehold reversion by release; but not before entry, because he then had but an *interesse termini* and no possession, and the release by way of enlarging an estate could only operate upon a possession; before entry there was no reversion and the immediate freehold could only pass by livery (c). Release to lessee for years.

The capacity of a lessee for years to take the reversion by release, supplied the means in early times of conveying an immediate freehold without livery of seisin. A lease for a year was first made under which the lessee obtained possession by entry, and was then in a position to take the reversion by release. By the lease and re- Conveyance of freehold by lease and release, without livery.

(a) See *Watts v. Ognell*, Cro. Jac. 192; *De Nicholls v. Saunders*, L. R. 5 C. P. 589; 39 L. J. C. P. 297; *Cook v. Guerra*, L. R. 7 C. P. 132; 41 L. J. C. P. 89.

(b) Lit. s. 465; Co. Lit. 273 a; as to the different kinds and opera-

tions of releases, see Lit. s. 444; Co. Lit. ib.; Butler's note (1) to Co. Lit. 267 a; and see *post*, Part IV. 'Conveyances.'

(c) Lit. s. 459, 460; Co. Lit. 46 b; 270 a; *ante*, p. 44, 49.

lease thus executed the freehold was conveyed as effectually as by feoffment with livery of seisin (*a*).

Lease for years
by bargain and
sale without
entry.

After the passing of the statute of uses the necessity of an actual entry to perfect the estate of the lessee was obviated by making a bargain and sale for a year instead of a lease for a year at common law; a use was thereby created in the lessee which was at once executed in possession by mere force of the statute, as hereafter explained. In this form the conveyance by lease and release, without entry or livery of seisin, continued in use for the transfer of freehold estates until quite recent times (*b*).

Statute making
release effectual
without lease.

The statute 4 Vict. c. 21, s. 1, further simplified this mode of conveyance by dispensing with the lease altogether, and rendering the release alone as effectual for the conveyance of freehold estates as if the releasing party had also executed a deed of bargain and sale or lease for a year for giving effect to such release.

Lease and release
superseded by
grant.

But the conveyance by lease and release is now superseded altogether by the more direct conveyance by deed of grant, which, under the statute 8 & 9 Vict. c. 106, s. 2, was rendered effectual for the transfer of all freehold estates (*c*).

Disseisin.

Disseisin was a wrongful entry upon the land and *ouster* or dispossession of the freeholder. The seisin *de facto* thereby obtained had the same effect as a rightful seisin in conferring an apparent title to the land, and the means of alienation by livery. The disseisee retained a mere *right of entry* (*d*).

Disseisin divested
remainders and
reversion.

Disseisin of the tenant of a particular estate disseised or divested all the estates in remainder or reversion, and converted them into mere rights of entry, exercisable in their order of succession (*e*).

(*a*) 2 Sand. Uses, 62, citing Year books, 11 H. 4, 33; 21 Ed. IV. 24.

(*b*) 2 Sand. Uses, 62; see *post*, Chap. III. 'Law of Uses.'

(*c*) See *ante*, p. 51.

(*d*) Lit. s. 279; Co. Lit. 153 b, 181 a; "every entry is no disseisin, unless there be an ouster also of the freehold." *Ib*.

(*e*) See *ante*, p. 46.

The tenant himself of the particular estate whether for life, or for years, having the actual seisin, had it in his power to make a feoffment to another by livery, which effectually conveyed the fee, if it in terms imported to do so, irrespectively of his own estate or interest; and such feoffment disseised all the estates in remainder or in reversion dependant upon his seisin and converted them into rights of entry (*a*). Feoffment by tenant in tail operated rightfully at common law, but was provided against by the statute *de donis*, giving a writ of *formedon* to the issue or reversioner or remainderman. It therefore took away the right of entry and left only the right of action under the statute (*b*).

Conveyances having tortious operation,—feoffment by tenant of particular estate,

But such act on the part of the tenant for life or for years was a direct breach of the conditions of his tenure, and operated as a forfeiture of his estate, which thus became merged or extinguished in the reversion or seignory, and the reversioner or next remainderman became entitled to the immediate possession with the right to enter accordingly (*c*).

operated as a forfeiture.

In such case if the next estate in remainder was then in contingency so that it could not take effect in possession, it failed altogether, and the next vested remainder took immediate effect, because the freehold could not remain in abeyance. Contingent remainders might thus be destroyed by a feoffment of the tenant of the particular estate; and it was formerly the practice to use feoffments for this purpose (*d*). The statute 8 & 9 Vict. c. 106, s. 8, protected contingent remainders from this mode of destruction, enacting that they should be capable of taking effect, notwithstanding the determination by forfeiture of

destroyed contingent remainders.

Contingent remainders preserved by statute.

(*a*) Lit. ss. 599, 611, 698; Butler's note (1) to Co. Lit. 330 *b*.

(*b*) Lit. 595, 596, 597; Co. Lit. 327 *a*, *b*; see *ante*, p. 37.

(*c*) Lit. ss. 415, 416; Co. Lit. 233 *b*, Butler's note, *Ib.*; Co. Lit. 251 *a*, *b*; 252 *a*; Gilbert's Tenures,

38, 39; see *Doe v. Lynes*, 3 B. & C. 388.

(*d*) *Archer's Case*, 1 Co. 66 *b*; *Chudleigh's Case*, 1 Co. 135 *b*; *Doe v. Gatacre*, 5 Bing. N. C. 609; see *post*, Part II. Chap. II. 'Contingent Remainders.'

any preceding estate of freehold in the same manner as if such determination had not happened.

Fines and Recoveries.

A fine or recovery, in general, had the same efficacy as a feoffment in conveying the fee, if it purported to do so; and if by a tenant for life, it induced a forfeiture of his estate and thereby destroyed contingent remainders immediately expectant (*a*).

Grant and release had no tortious operation.

Conveyances by deed without livery, as a grant, release, or a lease and release, in whatever terms, had no effect beyond the estate and interest which the person executing might rightfully convey. Those conveyances only which operated directly upon the seisin, as feoffments, fines and recoveries could operate tortiously according to their import, irrespectively of the estate of the party conveying (*b*). So, of things lying in grant as rents, commons, reversions and remainders, the conveyance, though importing to be in fee, had no tortious effect, nor did it induce a forfeiture, for nothing passed thereby but that which rightfully might pass (*c*).

Tortious operation of conveyances taken away by statute.

By the 8 & 9 Vict. c. 106, s. 4, a feoffment has no longer any tortious operation, and Fines and Recoveries were abolished by the statute 3 & 4 W. IV, c. 74; consequently the doctrines of law relating to the tortious operation of conveyances and the forfeiture thereby incurred have no longer any application.

Right of entry.

An entry on the land within the time allowed by law restored the seisin, and, if made by the tenant of a particular estate, it restored or revested the estates in remainder or reversion, which were dependant upon the same title. Hence a right of entry was sufficient to preserve a contingent remainder (*d*).

(*a*) Co. Lit. 356 *a*; *Doe v. Gatacre*, 5 Bing. N. C. 608; notwithstanding the recovery by tenant for life was made void by statute 14 Eliz. c. 8, and see *Smith v. Clyfford*, 1 T. R. 738. As to the effect of a fine or recovery by tenant in tail, see *ante*, p. 39. Fine by lessee for years operated

only by estoppel between the parties and had no ulterior effect; see *Fermor's Case*, 3 Co. 77 *a*; 3 Atk. 141, *Smith v. Dormer*.

(*b*) Lit. ss. 600, 618; Co. Lit. 332 *a*; Butler's note to Co. Lit. 330 *a*.

(*c*) Co. Lit. 251 *b*.

(*d*) Fearn, C. R. 286.

The right of entry, arising upon a disseisin, was lost in certain events; as by the seisin being cast by descent upon the heir of the disseisor, which was technically called a *descent cast* (a);—also by an alienation of the fee by the disseisor to another, which was called a *discontinuance* of the possession (b). On the other hand, the right of entry might be kept alive against a descent cast by the process of *continual claim* (c).

Right of entry lost by descent cast,

by discontinuance.

preserved by continual claim.

Where the right of entry was lost there remained a mere right of action, to be prosecuted within certain limits of time in the form of real action provided for the circumstances of the case (d).

Right of action.

The doctrines concerning rights of entry and of action and the proceedings in real actions were highly technical and elaborate, and formed a large and complicated branch of the law of real property, until the amendments of the law made by the statute 3 & 4 W. IV, c. 27. By that statute, s. 36, real actions were abolished, and the action of ejectment was left as the only, and the comparatively simple, remedy at law for the recovery of the possession of land. By the same statute the right of entry or action is no longer defeated by a *descent cast* or a *discontinuance* (s. 39); and it is exempted from all other casualties except lapse of time. But it must be prosecuted within twenty years next after the accrual of the right (s. 2); subject to the provisions of the statute in the case of disabilities in the person entitled, (ss. 16–19.)

Statute abolishing real actions,

Descent cast and discontinuance.

Limitation of entry or action.

A right of entry was not assignable at common law by deed, nor by will; though it might be released to the person in actual seisin of the freehold; and if not so released it descended to the heir (e). A Right of entry, whether immediate or future, and whether vested or contingent, may now be disposed of by deed, 8 & 9 Vict. c. 106, s.

Assignment of right of entry.

(a) Lit. s. 385; Co. Lit. ib.

(b) Lit. s. 592; Butler's note to Co. Lit. 325 a.

(c) Lit. ss. 414, 417, 422, 423.

(d) See Butler's note (1) to Co.

Lit. 239 a.

(e) Co. Lit. 214 a, 266 a; Perkins, ss. 85, 86, 156, 271; see *Culley v. Taylerson*, 11 A. & E. 1008, 1020.

6; and may be devised by will, 1 Vict. c. 26, s. 3; and will descend in the same manner as the land, if recovered, would descend, 3 & 4 W. 4, c. 106, ss. 1, 2.

SECTION IV. § 1. DESCENT AND § 2. DISPOSITION BY WILL.

§ I. DESCENT.

Seisin as root of descent—descent traced from purchaser under the Inheritance Act.

Descent restricted to the blood of the purchaser—breaking the descent.

Half blood excluded at common law—doctrine of *possessio fratris*—half blood admitted by the Inheritance Act.

Descent in tail.

Preference of males—preference of the paternal line.

Primogeniture—parceners.

Lineal ancestors excluded at common law—collateral descent—lineal ancestors admitted by the Inheritance Act—collateral descent excluded.

Right of representation to deceased ancestor.

Seisin the root of descent.

As the seisin presumptively represented the fee, so it was also taken as the root of descent,—as expressed in the maxim *seisina facit stipitem*. The title by descent was traced from the person last seised (*a*). The heir originally derived title from the terms of the grant, *per formam doni*, and must accordingly have traced his descent from the original grantee or purchaser; but the adoption of the seisin as the root of descent was a maxim of convenience to avoid further inquiry into the origin of the title (*b*).

(*a*) Co. Lit. 11 *b*; Bracton, 65 *b*; 2 Blackst. Com. 209.

(*b*) See *ante*, p. 32. "It is not properly a rule of descent, but of evidence, and is not therefore substantive but relative to the old feudal course of succession, and calculated to make that good as far as possible; for it becoming in many cases im-

possible, by length of time and a long course of descents, to deduce a title to the first feudatory or purchaser, proof of being heir to the last was necessarily allowed as the best proof that could be expected of title from the first." Wright on Tenures, 185.

According to the above maxim, an heir, by obtaining Seisin of heir. seisin in fact, (either by entry or through the possession of a tenant,) constituted himself a new root of inheritance; his heir was not necessarily the heir of the purchaser. The seisin in law which vested in an heir before entry was not sufficient to change the root of descent from his ancestor, as being the person last seised (*a*). A purchaser, of purchaser. or person entitled otherwise than by descent, had in all cases sufficient seisin to make the root of descent (*b*). A disseisor could transmit the seisin by descent, and the of disseisor. descent cast (until 3 & 4 W. IV. c. 27, s. 39) took away the right of entry of the disseisee (*c*).

The Inheritance Act, 3 & 4 W. IV, c. 106 (applying to Descent from purchaser, under Inheritance Act. all descents after 1833), restored the original principle of descent by enacting that "in every case descent shall be traced from the purchaser." But it added the rule that "the person last entitled to the land shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same." This rule, enacted as a substitute for the above common law maxim as to seisin, "to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require," more nearly satisfies the original principle of reaching the purchaser.

Notwithstanding the force attributed to seisin as the Descent restricted to blood of purchaser. root of descent, the principle of descent from the purchaser appeared in the rule of common law which confined the descent to the blood of the purchaser; according to which rule the heirs on the mother's side were excluded from an inheritance descended from the father, and conversely (*d*). The above rule is now included as a con-

(*a*) Lit. s. 4, 8; Co. Lit. 14 *b*, 15 *a*; *Goodtitle v. Newman*, 3 Wils. 516.

(*b*) *Doe v. Thomas*, 3 M. & G. 815.

(*c*) See *ante*, p. 59.

(*d*) Lit. s. 4; Co. Lit. 12 *a*. "Note,

it is an old and true maxim in law, that none shall inherit any lands as heir, but only the blood of the first purchaser, for *refert a quo fiat perquisitum*." Bracton, 65 *b*; 2 Blackst. Com. 222.

sequence of the new rule of the Inheritance Act, that in every case descent shall be traced from the purchaser.

Breaking the descent.

A person taking by descent might by various means acquire a new title by purchase and so break the former line of descent and constitute himself a new root, not only as regards the seisin, but for all purposes. He might thus admit both his paternal and maternal lines of heirs, on whichever side the inheritance might have descended upon him. The Inheritance Act (s. 3) renders a direct conveyance to himself sufficient for this purpose, before which enactment it required, at common law, a feoffment and re-feoffment, or conveyance and re-conveyance, to break the line of descent (*a*).

Half-blood excluded at common law.

The same principle of descent from the purchaser extended at common law to the general exclusion of relations of the half blood of the person last seised, upon the ground that they were as likely not to be, as to be, descended from the purchaser (*b*).

Doctrine of *Possessio fratris*.

Hence the peculiar effect of the *possessio fratris*, or seisin of a brother inheriting from the father, in excluding a brother of the half blood from the future inheritance. Thus, where the father died seised in fee simple, leaving a son and daughter by a first marriage and a son by a second marriage, if the eldest son entered and died without issue, the daughter inherited and not the younger son, though he was next heir to the father, because the descent was traced from the eldest son as the person last seised, to whom the half brother could not inherit; but if the elder son died without entry, the younger son inherited, and not the daughter, because the descent was then traced from the father. The inheritance of the sister to the exclusion of the half brother was expressed in the maxim,

(*a*) Co. Lit. 12 *b*; *ante*, p. 52; see *Roe v. Baldwere*, 5 T. R. 104; *Nanson v. Barnes*, L. R. 7 Eq. 250; as to conveyances under the Statute of Uses, see *post*, Part I.

Chap. III. 'Law of Uses.'

(*b*) Lit. ss. 6, 7; Co. Lit. 14 *a*; Hargrave's note (3) to Co. Lit. 14 *a*; Wright on Tenures, 186; 2 Blackst. Com. 228.

possessio fratris de feodo simplici facit sororem esse hæredem (a).

The Inheritance Act, s. 9, enacts "that any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir;" and it assigns the place in which any such relation by the half blood shall stand in the order of inheritance, giving priority to the relations of the whole blood.

Half blood made capable by the Inheritance Act.

An heir in tail still claims *per formam doni*, by substitutional gift and not by right of descent; and the title to a fee tail must in all cases be traced from the original donee in tail (b). Hence the doctrine of *possessio fratris* had no application to a fee tail, for the seisin of the heir in tail did not change the root of descent. The half blood coming within the description of the entail are as capable of succeeding as the whole blood (c).

Descent in tail.

The exigencies of feudal tenure required an efficient tenant to perform the services and duties of the fee. Hence as a general rule of descent males were preferred to females in each degree; or, as it was expressed, the *worthiest of blood* should inherit. Therefore the son was preferred before the daughter, the brother before the sister, the uncle before the aunt (d).

Preference of males.

According to this rule, in collateral descent from a purchaser, though the heirs on the side of both parents might inherit, yet all those on the father's side, including females, were preferred before any on the mother's side. (Thus Coke says,—“Here it is to be understood that the father hath two immediate bloods in him, viz., the blood of his father and the blood of his mother. And both these

Preference of the paternal line.

(a) Lit. s. 8; Co. Lit. 14 b; see *Goodtitle v. Newman*, 3 Wils. 516; *Doe v. Keen*, 7 T. R. 386.

(b) See *ante*, p. 37; Bracton, 68 b, 69 a; 2 Blackstone, 221, 222.

(c) Co. Lit. 14 b; *Doe v. Wichelo*,

8 T. R. 211, per Kenyon, C. J.

(d) Co. Lit. 14 a; Bracton, 65 a; see Hale's first general rule, "in descents the law prefers the worthiest of blood." Hale, Hist. Com. Law, Runnington's ed. 320.

bloods of the part of the father must be spent before the heir of the blood of the part of the mother shall inherit. And the reason of all this is, for that the blood of the part of the father is more worthy, and more near in judgment of law, than the blood of the part of the mother" (a).

Primogeniture

Parceners.

The exigencies of feudal tenure also required, in general, a single tenant to secure the performance of the services and duties of the fee; and the eldest was selected amongst males of equal degree (b). With females, there being no capacity for the active duties of tenure, all took together as one heir to their ancestor; but the law enabled them to obtain a partition of the land, whence they were called *parceners* (c).

Lineal ancestors
excluded at com-
mon law.

The common law excluded lineal ancestors as such, it being a maxim that an inheritance could descend but not ascend (d), but it admitted collaterals to inherit in

(a) Co. Lit. 12 b; and see Co. Lit. 14 a; Lit. s. 4.

(b) Lit. s. 5; Co. Lit. 14 a. Primogeniture obtained in military tenures as early as the reign of William the Conqueror, such tenures peculiarly requiring a single personal representative of the fee, but in the time of Glanvill (Hen. II.) socage lands were still partible amongst all the sons, according to the ancient English rule of descent. In the reign of Henry III., or soon after, primogeniture obtained also in socage tenure. Glanvill, l. 7, c. 3; see Beames' transl. 152; Co. Lit. 14 a; Butler's note to Co. Lit. 191 a, V. 4; Land in the county of Kent still retains the ancient rule of partition under the custom of Gavelkind, *ante*, p. 25; Robinson, on Gavelkind, c. ii.; Hale's Hist. C. L. c. xi., Runnington's ed. p. 312. No material alteration occurred in the rules of descent as they appear in Bracton (temp. H. 3) until the passing of the Inheritance Act of

Will. IV. Hale, p. 318.

It may be here observed that the custom of primogeniture was not founded on any such idea of beneficial preference of the eldest son as attends it in modern times, for the onerous duties and returns of the tenure must be supposed to have been originally a full equivalent for the fee. The lord doubtless dispensed his lands, which were his only wealth, for the largest returns he could get, in supply of his various wants. By the abolition of the feudal incidents and the depreciation or purchase of fixed rents, the tenant in course of time acquired a substantial beneficial interest in the fee, and the eldest son now succeeds to a valuable inheritance.

(c) Lit. s. 241; Co. Lit. 163 b. The common law writ of partition was taken away by 3 & 4 Will. IV. c. 27, s. 36, and the proceeding is now by bill in Chancery for partition.

(d) Lit. s. 3; Co. Lit. 10 b, 11 a.

theirown right, as brothers and sisters, uncles, great-uncles, etc., who were traced from the ancestors in ascending order. Hence according to Coke, "a division of heirs, viz., lineal (who shall first inherit) and collateral (who are to inherit for default of lineal); for in descents it is a maxim in law, *quod linea recta semper præfertur transversali*. Lineal descent is conveyed downward in a right line; as from the grandfather to the father, from the father to the son, etc. Collateral descent is derived from the side of the lineal; as grandfather's brother, father's brother, etc.—and the father's brother and his posterity shall inherit before the grandfather's brother and his posterity" (a). As the inheritance could not ascend in a right line, the father could not succeed to the inheritance of the son except as collateral heir to the uncle, if the latter by dying seised formed a new root of descent (b).

The Inheritance Act altered the law both as to lineal ancestors and collaterals. It renders the lineal ancestors capable of inheriting and ranks them in ascending order next after the issue of the purchaser; and at the same time it excludes collateral inheritance, except by right of representation to the ancestor (c). According to the interpretation clause (s. 1), "the word 'descent' shall mean the title to inherit lands by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation as where he shall be a child or other issue" (d).

The right of representation to a deceased ancestor, who, if he had lived, would have inherited, remains as at common law; his eldest son or other lineal heir inherits by right of representation. Thus, a child or grandchild or remoter lineal descendant of a deceased eldest son succeeds before a younger son. "Whensoever the father,

(a) Co. Lit. 10 b, 13 b; Lit. ss. 2, 5.

(b) Lit. s. 3.

(c) Sects. 5, 6, and see as to the order of ancestral descent, ss. 7, 8, *post*, Part IV. Chap. III. 'Descent.'

(d) According to Coke, "descent in the legal sense signifieth when lands do by right of blood fall unto any after the death of his ancestors." Co. Lit. 13 b.

if he had lived, should have inherited, his lineal heir by right of representation shall inherit before any other, though another be, *jure propinquitatis*, nearer of blood" (a).

The rules and doctrines of descent, as at common law and under the Inheritance Act, of which the sources and principles are here briefly referred to, will be more fully detailed in treating of descent hereafter. (b).

§ 2. DISPOSITION BY WILL.

Land not devisable at common law—except by special custom—
uses in equity devisable—until the Statute of Uses.

Statutes of Wills—Statute of Frauds—the Wills Act, 1 Vict.
c. 26.

Disposition by will—how far subject to the rules of common law
—how far independent of those rules—devises of future
estates.

Construction of wills—use of technical terms.

Land not devis-
able at common
law,—except by
special custom.

The feudal principles of the common law did not admit of a disposition by will of land of freehold tenure. Upon the death of the tenant his heir was originally entitled by the terms of the grant; and though afterwards the title of the heir became liable to be defeated by an alienation of the ancestor during life, it was never defeasible at common law by a devise or testamentary disposition at death. Land was devisable by will in some places by special custom, as lands of gavelkind tenure in the county of Kent, land in the City of London, and in some boroughs; which customs are supposed to be relics of the earlier and præ-feudal common law (c).

(a) Co. Lit. 10 b; 2 Blackst. Com. 216.

(b) Part IV. Chap. III. 'Descent.' See the rules of descent at common law stated in St. German, Doctor and Student, Dial. 1, c. 7; Hale's Hist. Com. Law, c. xi.; and see the Tables in Hayes Conv. App.

ix., clearly indicating the course of descent before and since the Inheritance Act.

(c) See *ante*, p. 33; Lit. s. 167; Co. Lit. 111 a; Hargrave's note (1) on Co. Lit. 111 b; 6 Co. 16 b, *Wild's Case*; Robinson on Gavelkind, b ii. c. v.

Under the system of uses, to be noticed presently, the use or beneficial interest in the land, as recognised in the Court of Chancery, became disposable by will; and a testamentary disposition of land might be effected by conveying it to be held to the uses to be declared by will (*a*). The Statute of Uses, 27 Hen. VIII., by the conversion of uses into legal estates, took away this capacity of testamentary disposition; but, probably for that reason, it was soon followed by the Statutes of Wills, conferring a direct testamentary power over the legal estate.

Uses in equity devisable,—until the statute of Uses.

These statutes, 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5, empowered a tenant in fee simple to give, dispose, will or devise to any person or persons by his last will and testament in writing, all his manors, lands, tenements, rents and hereditaments or any of them, “at his own free will and pleasure.” The power was expressly restricted, as to lands held by the tenure of knight’s service, to the extent of two-thirds of such lands only. But the statute, 12 Car. II. c. 24, which afterwards converted the tenure of knight service into socage tenure, abolished this restriction, and rendered all lands of freehold tenure uniformly disposable by will (*b*).

Statutes of Wills.

The Statute of Frauds, 29 Car. II. c. 3, s. 5, further regulated the form of wills of lands, by enacting (sect. 5) “that all devises and bequests of any lands or tenements devisable either by force of the Statute of Wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and

Statute of Frauds, as to the form of wills.

(*a*) Lit. ss. 462, 463; Co. Lit. ib.; Perkins, s. 528, 538; *Clere’s Case*, 6 Co. 17 *b*; see *post*, p. 102.

(*b*) Co. Lit. 111 *b*; Hargrave’s note (1) ib.; see Butler’s note to Co. Lit. 271 *b*, III. 5.

of none effect. Sect. 6 prescribed the modes by which devises might be revoked (*a*).

The Wills Act, 1
Vict. c. 26.

The above enactments were all repealed by the last Wills Act, 7 Will. IV. & 1 Vict. c. 26, s. 2 (except as to wills made before 1838, sect. 34); and under this statute the power to dispose of real estate by will now subsists, and the mode of exercising it is regulated (*b*).

Disposition by
will.

A disposition by will, equally with a disposition by deed, is subject to the general rules of the common law regulating the estates or interests which may be given.

How far subject
to the rules of
the common law.

A testator can only devise such estates as are known to the law, nor can he alter or take away the legal incidents and qualities of such estates; for instance, he cannot render estates of inheritance inalienable, nor alter the law of inheritance (*c*).

How far inde-
pendent of rules
of law.

But the power of disposition by will, being derived directly from the statute, is for the most part independent of the restrictions imposed by the peculiar feudal doctrines of the common law, and by the common law forms of conveyance. Devises of freehold estates were operative without livery of seisin, and without attornment, before these formalities were dispensed with by statute (*d*).

Devises of future
estates.

Devises of freehold estates may be made to take effect *in futuro*, at a future date or upon any specified event, leaving the inheritance in the meantime to descend to the heir; or such devises may be made to take effect in defeasance of and in substitution for preceding devises;—although such limitations of estates are contrary to the rules of the common law, which admit no future limitations or substitutions of the tenancy, except by way of remainders (*e*). These future devises are analogous

(*a*) See Hargrave's note(3) to Co. Lit. 111 *b*.

(*b*) See *post*, Part IV. Chap. II. 'Disposition by Will.'

(*c*) See *Holmes v. Gordon*, 8 De G. M. & G. 152; 25 L. J. C. 317.

"Albeit a devise may create an in-

heritance by other words than a gift can, yet cannot a devise direct an inheritance to descend against the rule of law." Co. Lit. 25 *a*.

(*d*) Lit. s. 586.

(*e*) See *ante*, p. 46, 47.

to the springing and shifting uses which became legal limitations under the Statute of Uses, and they are called distinctively *executory* devises (a).

The testator, in expressing his intention, is not restricted to the technical language of the common law;—Construction of wills. nor to any technical rules, beyond the rules of construction which, with some aid from statutes, have been developed by judicial criticism and authority.

But a testator in using technical words, is presumed to use them in their technical meaning and effect, unless he expresses a clear intention of using them otherwise.Presumptive meaning of technical terms. Hence devises in the terms of common law are construed according to the rules of common law, as in a deed; so devises to uses expressly declared are presumed to be intended to pass estates according to the operation of the Statute of Uses and are so construed, as will be explained hereafter in treating of Uses (b).

The principles thus generally indicated are carried out in particular rules regulating the power of testamentary disposition and the construction of devises, which will be stated in their appropriate places in treating of the matters to which they are applied.

(a) See ante p. 113; *post*, Part II. Ch. II. Sect. III., “Executory Devise.”

(b) See Butler’s note to Co. Lit. 271 b, III. 5; 1 Sanders on Uses,

241; Hawkins on Wills, Introduction; 2 Jarman on Wills, 196; as to the application of the Statute of Uses to wills, see *post*, p. 122.

CHAPTER II.

CUSTOMARY TENURE.

- Section I. Origin and form of customary tenure.
- II. Limitation and transfer of customary estates.
- III. Rights and Remedies incident to customary tenure.
- IV. Extinguishment, Regrant and Enfranchisement.

SECTION I.

ORIGIN AND FORM OF CUSTOMARY TENURE.

Origin of customary tenure—Villenage—services of villenage.

Form of customary tenure—tenancy at will of the lord—conveyance by surrender and admittance—title by copy of court roll.

Customary Court—court rolls.

Customs of manors—general customs—special customs—evidence of customs.

Land is not grantable by copy, except by custom—custom to grant waste by copy.

Copyhold and customary freehold—Special forms of customary tenure.

Customary tenures excepted from 12 Car. II.—application of statutes to customary tenure.

Origin of customary tenure.

The law of freehold tenure is of universal application, extending over all lands within the realm. Customary tenure exists only in certain places, concurrently with the freehold tenure; and in those places the rights of the freeholder are subjected to the rights of the customary tenant. Customary tenures are generally supposed to have arisen in the following manner.

Under the manorial system described in the last chapter the territory of the manor was partly held by the lord in demesne, and partly granted out in fee to freehold tenants upon services. Of the demesne lands

part were occupied by the lord himself, and part were usually allotted to a class of tenants, to whom freehold estates, with the attendant rights of freeholders, were not conceded. This class called *villains*, seem to have been originally in the position of slaves, whose persons and labour from their birth belonged absolutely to the lord. They occupied the parcels of land, necessarily allotted to them for dwelling and maintenance, by a tenure called *villanage*, holding at the will of the lord and being removable at his pleasure (a).

Villanage.

In course of time the usage prevailing in the manor in regard to these tenants, under the control and influence of the general law of the land, imposed restrictions upon the lord's absolute right to dispossess them and to the disposal of their persons and services, until by force of custom they ultimately acquired the fixity of tenure, together with the freedom of person and certainty of service, which appears in modern times in customary tenure. Thus, in relation to freehold tenure these lands were still reputed to be *demesne* lands, being held at the will of the lord and resumable at pleasure; but under the customary tenure they became *tenemental* according to the custom of the manor (b).

The services of villanage consisted chiefly of agricultural labour on the lord's demesne lands; and though originally arbitrary in kind and quality as regards the pure villein, they were afterwards regulated by the

Services of villanage.

(a) "*Villeine is à villa, quia villæ adscriptus est*—and in the common law he is called *nativus, quia natus est servus*. Villanage is the service of a bondman." Co. Lit. 116 a. "*Villani sunt qui glebæ ascripti villam colunt dominicam*." Spelman Gloss. "*Villa, vernaculè a manor*." Ib. Villeins were either regardant *i.e.*, appurtenant to a manor, passing with the manor as part of the property in it;—or in gross, *i.e.*, the personal property of the

lord and not appurtenant to any manor or land. Lit. s. 181; Co. Lit. 117 b; 120 b. The title to a villein required prescription, *i.e.* immemorial custom, or, what was equivalent, confession of such title in a court of record. Lit. s. 175.

(b) *Ante*, p. 19; Lit. s. 172; Co. Lit. ib.; Co. Cop. ss. 12, 13, 14, 32; *Brown's Case*, 4 Co. 21 a; see *Rivis v. Watson*, 5 M. & W. 255; *Winter v. Loveday*, Comyn. 40; 1 L. Raym. 267; 2 Salk. 537.

custom of the manor. In course of time they were, for the most part, commuted, like other services, into money payments or rents, and thus became rent service recoverable by distress (a).

Form of customary tenure.

Customary tenure in point of form bears the distinctive characteristics of its origin.—The tenant is technically described as holding at the will of the lord, according to the custom of the manor (b).

Tenancy at will of the lord.

Conveyance by surrender and admittance.

He has no power of disposition by feoffment, grant or other common law conveyance, but only by surrender and admittance. By custom he may *surrender* his tenancy to the lord *to the use* of any person or persons designated by him; and the lord is bound to *admit* such persons into the tenancy according to the *uses* declared in the surrender (c).

Title by copy of Court Roll.

The surrender and admittance and all other transactions relating to the title are entered upon the rolls of the court of the manor. Copies of the rolls are delivered by the steward to the tenants as evidence of their title; whence the tenure is called *copyhold*, and the tenants are called *copyholders*, as holding by *copy of Court Roll* (d).

Customary Court.

The court in question is the customary branch of the Court Baron, already referred to; in this branch of the court the lord or his steward is the sole judge. The Customary court may be held notwithstanding the freehold branch of the Court Baron has become extinguished, and the manor in its legal integrity destroyed, so as to remain only a manor by repute (e). The statute 4 & 5 Vict. c. 35, s. 86, enables the lord or steward to hold a Customary court, though there be no copyhold tenants of

(a) Lit. ss. 172, 213; Co. Lit. 120 b; *Laugher v. Humphrey*, Cro. Eliz. 524. See *ante*, p. 24.

(b) Lit. ss. 73, 82.

(c) Lit. s. 74; see *Doe v. Webber*, 3 Bing. N. C. 922; *Dimes v. Grand Junction Canal Co.* 9 Q. B. 469.

(d) Lit. ss. 73, 75; Co. Lit. 58 a; see 9 Co. 76 b, *Combe's Case*.

(e) See *ante*, p. 20, 21; Co. Lit. 58 a; see *Bradshaw v. Lawson*, 4 T. R. 443; *Holroyd v. Breare*, 2 B. & Ald. 473; *Bradley v. Carr*, 3 M. & G. 221.

the manor, or though there be no such tenant present at such court.

The court rolls are kept for the benefit of the tenants and all parties interested, as well as of the lord ; therefore a person showing a *prima facie* interest may obtain an inspection of the parts that concern his interest, by mandamus or order of court (a). The Court Rolls.

The court rolls are evidence of the transactions recorded, and may be produced to prove a surrender or admittance or other matter of entry. The copies of court roll delivered by the steward are also admissible in evidence in all cases to prove the title of the tenant. The stamp Acts require the copy to be stamped, but not the original court roll ; and it is no objection to the production of the latter that there is no stamped copy. The copyholder is not obliged to take a copy of the roll of his title (b).

The court rolls are not, like the records of a superior court, conclusive upon the parties, but the transaction may be proved, or the roll corrected, by extrinsic evidence (c).

The customs of manors regulatiug customary tenure are so far uniform as to admit of a general custom, or system of rules generally applicable, as common law, to lands of that tenure ; but subject to variation by the special customs prevailing in particular manors (d). General customs of manors.

Courts of justice take judicial notice of the general customs of manors without proof ; but special customs must be particularly alleged and proved in legal proceedings (e). General custom judicially noticed.

(a) Scriven on Cop. 494, 4th ed. ; Taylor on Evidence, 1295, 5th ed. ; *Hoare v. Wilson*, L. R. 4 Eq. 1 ; *Minet v. Morgan*, L. R. 11 Eq. 284.

(b) *Doe v. Hall*, 16 East, 208 ; *Doe v. Mee*, 4 B. & Ad. 617.

(c) Co. Cop. s. 40 ; *Winter v. Jeringham*, Dyer, 251 b ; *Kite v. Queinton*, 4 Co. 25 a ; *Hill v. Wiggett*, 2 Vern. 547 ; *Doe v. Callo-way*, 6 B. & C. 484 ; *Elston v. Wood*,

2 My. & K. 678.

(d) Lit. s. 80 ; Co. Cop. s. 33 ; *Combe's Case*, 9 Co. 75 a.

(e) Co. Lit. 175 b ; Bac. Abr. Cop. D. ; 1 Salk. 184 ; *Clements v. Scudamore*, 1 Salk. 243 ; see *Griffin v. Blandford*, Cowp. 63.

The crown, being lord of a manor, is entitled to institute a suit in equity to have the customs of the manor established by a decree of the court,

Special customs
of manors.

Special customs of a manor are proved by immemorial uninterrupted usage; subject to the conditions of being certain and reasonable (*a*). "Of every custom there be two essential parts, time and usage; time out of mind, and continual and peaceable usage without lawful interruption" (*b*);—and "this incident every custom must have, viz., that it be consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in law" (*c*).

Customs void as
unreasonable or
uncertain.

Thus, a custom alleged to be that no copyholder shall use his common until the lord have put in his cattle is void because unreasonable, for the lord by not putting in his cattle might deprive the tenant of his common (*d*). A custom alleged for the lord of a manor to enclose the waste without limit, as against the rights of common in the tenants of the manor, is bad for the same reason (*e*). A custom in a manor for the customary tenants to dig turf for the improvement of their tenements, as occasion requires, was held bad as being unreasonable and uncertain (*f*).

Immemorial
usage

Immemorial usage originally meant a usage which could not be proved to have had a definite commencement at any time however remote. The time required for deducing title to land, and during which a presumptive title might be rebutted by proof of an adverse possession, was at common law equally indefinite; until by statute 3 Ed. I. c. 29, the date for alleging seisin and deducing title in real actions was fixed at the commencement of the reign of Richard I. (A.D. 1189); and by an equitable extension

and also an injunction to restrain an action raising any questions which are involved in such suit. *Attorney-Gen. v. Barker*, L. R. 7 Ex. 177; 41 L. J. Ex. 57, and it seems a similar suit to establish customs may be maintained by a subject, lord of a manor, or by the tenants. See *Ib.*; *Warwick v. Queen's Coll.* L. R. 6 Ch. 716; *Mayor of York*

v. Pilkington, 1 Atk. 282.

(*a*) Co. Cop. s. 33.

(*b*) Co. Lit. 110 *b*.

(*c*) Co. Lit. 62 *a*.

(*d*) Co. Cop. s. 33; 5 Co. 84 *a*.

(*e*) *Badger v. Ford*, 3 B. & Ald. 153; *Arlett v. Ellis*, 7 B. & C. 346; *Betts v. Thompson*, L. R. 6 Ch. 732.

(*f*) *Wilson v. Wiles*, 7 East, 121.

of this statute the same date was adopted for all rights dependent upon usage (a).

Accordingly, 'The Act for shortening the time of pre-
 scription in certain cases,' 2 & 3 Will. IV, c. 71, recites in
 the preamble that "the expression 'time immemorial or
 time whereof the memory of man runneth not to the con-
 trary,' is now by the law of England in many cases con-
 sidered to include and denote the whole period of time
 from the reign of King Richard the First, whereby the
 title to matters that have been long enjoyed is sometimes
 defeated by showing the commencement of such enjoy-
 ment." This act shortened the period of usage required
 for proof of the various rights therein mentioned as
 founded on prescription or usage, but it made no altera-
 tion in the rule requiring immemorial usage for the sup-
 port of prescriptive rights in general, including customs.
 The limitation for titles to land was modified from time
 to time by various statutes and finally by the statute of
 Limitations, 3 & 4 Will. IV, c. 27 (b).

Prescription Act
 defining imme-
 morial usage.

The special customs of a manor may be proved by
 entries on the rolls of the court, either of general state-
 ments of the custom made by a proper authority (c), or
 by entries of particular dealings with the land in a form
 recognizing the custom (d). An ancient customary of the
 manor handed down with the court rolls from steward to
 steward is admissible in evidence (e); also evidence of
 reputation of the custom may be given by the steward
 or by tenants or other persons acquainted with the cus-
 tom (f). Depositions in former suits on behalf of per-
 sons standing in *pari jure* are admissible (g). The customs
 of one manor are no evidence of those of another, even

Evidence of
 special customs.

(a) See 1st Rep. of Real Prop.
 Commiss. p. 51.

(b) See *post*, Part IV. Chap. VI.
 'Statutes of Limitation.'

(c) *Roe v. Parker*, 5 T. R. 26.

(d) See *Doe v. Mason*, 3 Wils.
 63; *Roe v. Jeffery*, 2 M. & S. 92;
Doe v. Askew, 10 East, 520; *Muggle-*

ton v. Barnett, 26 L. J. Ex. 47; 27
 Ib. 125.

(e) *Denn v. Spray*, 1 T. R. 466.

(f) *Doe v. Sisson*, 12 East, 62;
 see *Barnes v. Mawson*, 1 M. & S.
 77.

(g) *Freeman v. Phillips*, 4 M. &
 S. 486.

of a neighbouring manor, unless the two manors are so connected as to raise a presumption that they have the same customs (*a*).

Land cannot be granted by copy except by custom.

Land cannot now be granted upon customary or copyhold tenure, unless it has been so granted or grantable by immemorial custom; because custom alone sanctions this form of tenure (*b*). Copyholds have been created by statute in some few instances (*c*).

Special custom to grant waste by copy.

By special custom in some manors the lord may grant out portions of the waste to hold by the customary tenure of the manor; such land having been by the custom grantable, though not so granted, from time immemorial (*d*). But the lord cannot exercise such right to the prejudice of the rights of common of the tenants of the manor (*e*).

Copyhold.

There are two principal kinds of customary tenure:—the one *copyhold*, commonly so called, in which the tenant holds *at the will of the lord*, according to the custom of the manor, by copy of court roll;—the other called *customary freehold*, in which the tenant holds by copy, and according to the custom, but *not at the will of the lord*.—The distinction is explained by reference to the two kinds of ancient villenage from which modern customary tenure is derived.

Customary freehold.

Pure villenage.

Pure villenage was the tenure of villeins by birth,

(*a*) *Doe v. Sissons*, 12 East, 62; *Anglease v. Hatherton*, 10 M. & W. 218; see *Duke of Somerset v. France*, 1 Strange, 654. See a variety of special customs collected in *Watkins' Cop.* vol. ii., and in *Blount's Ancient Tenures*, by Beckwith.

(*b*) Co. Lit. 58 *b*; 4 Co. 24 *b*, *Murrel v. Smith*; *Revell v. Joddrell*, 2 T. R. 415; *Scriven on Cop.* 16, 17, 4th ed.

(*c*) See *Scriven*, 16, n. (*t*).

(*d*) 1 *Watkins on Cop.* by

Coventry, 45 n. (*l*.); *Doe v. Newman*, 2 Wils. 125; *Lord Northwick v. Stanway*, 3 B. & P. 346; *R. v. Wilby*, 2 M. & S. 504; *R. v. Hornchurch*, 2 B. & Ald. 189. "A copyhold cannot be created at this day, except by Act of Parliament or by custom to warrant the granting the waste as copyhold." *Doe v. Davidson*, 2 M. & S. 175, 184; see *Hodgson v. Hooper*, 29 L. J. Q. B. 222.

(*e*) See *ante*, p. 74, n. (*e*); *Warrick v. Queen's Coll.* L. R. 6 Ch. 716; *Betts v. Thompson*, *ib.* 732.

whose persons and services were at the arbitrary disposal of the lord and who originally held their lands absolutely at his will. These tenants became the modern *copyholders*, who still hold nominally at the will of the lord.

Villein socage was a privileged species of villenage in Villein socage. which the services were certain and due only by tenure, and not by reason of personal condition. It is said to have arisen from freemen taking grants of portions of the lord's demesne to hold for estates, freehold as to quantity and not at will only, but upon the same services as were rendered in villenage. This tenure became known as *customary freehold*; but the freehold title remains in the lord, and it is in other respects subject to the general law of copyhold (a).

The latter kind of tenure is said to be almost peculiar Tenants in ancient demesne. to manors of ancient demesne; whence the description of tenants in ancient demesne is sometimes used to designate these customary freeholders (b).

Some special forms of customary tenure occur in Special forms of customary tenure. several places in England, which come under the same consideration with the above, inasmuch as the freehold title is in the lord and they are regulated by the custom of the manor, but which have peculiar incidents and qualities differing from ordinary copyhold.

There is a species of customary freehold peculiar to Tenant right. the North of England, known as *tenant right*, in which the estate of the tenant passes by a common law conveyance and admittance by the lord (c).

(a) Lit. s. 172; Co. Lit. 116 a, b; Blackstone's Tracts, Cop. 211, 213, 230. *Primâ facie* estates of the latter kind will pass in a will by the description of copyhold, but not by the description of freehold. *Roe v. Vernon*, 5 East, 51; *Doe v. Danvers*, 7 East, 299. The word "copyhold" in statutes includes both kinds of tenure. *Doe v. Llewellyn*, 2 C. M. & R. 503.

(b) *Ante*, p. 25; Blackstone's Tracts, Cop. 217; see per Holt, C. J., Salk. 57. They are so termed in 5 & 6 W. & M. c. 24.

(c) *Doe v. Huntingdon*, 4 East 271; *Doe v. Davidson*, 2 M. & S. 175; *Burrell v. Dodd*, 3 B. & P. 378; see *Bingham v. Woodgate*, 1 R. & My. 32, where the custom required a conveyance as well as a surrender, and the freehold was held

Cattle gates.

There is also a species of customary tenure in the North of England known as *cattle gates* which are customary estates of inheritance held of the manor by certain fines, rents and dues, and passing by a customary deed presented at the Lord's court and followed by admission (a).

Customary
tenures excepted
from, 12 Car. 2.

Customary tenures are excepted, by the general description of tenure by copy of court roll, from the operation of the statute 12 Car. II, which reduced other tenures to the form of common socage (b).

Application of
statutes to copy-
holds.

It is a general rule, as to the application of statutes to land of copyhold tenure, that statutes which would operate in prejudice of those interests of the lord or tenant which are peculiar to the tenure do not extend to copyholds, unless expressly mentioned; but statutes which do not prejudice the interests of lord or tenant may include copyholds by general words, without expressly mentioning them (c).

to be in the tenant. And see instances of like customary freeholds in Kent, *Thompson v. Hardinge*, 1 C. B. 940; at Porchester, *Perryman's case*, 5 Co. 84 a.

(a) *Earl of Lonsdale v. Rigg*, 25 L. J. Ex. 73; 26 Ib. 196; *Graham v. Ewart*, 25 L. J. Ex. 42; 29 Ib.

297.

(b) Sect. 7; see *ante*, p. 30; *Doe v. Huntingdon*, 4 East, 271, 287.

(c) Co. Cop. s. 53; *Heydon's case*, 3 Co. 7 a; see *Doe v. Bottriell*, 5 B. & Ad. 131. See a list of statutes construed according to this rule, Scriven, Cop. 81-90.

SECTION II. THE LIMITATION AND TRANSFER OF ESTATES OF CUSTOMARY TENURE.

The customary estate—limitation of uses of surrender—construction of limitations.

Fee simple conditional—estate tail by special custom—modes of barring estate tail.

Future and contingent uses—powers of appointing uses—use limited to surrenderor.

Lease for years—at common law—under surrender to use—freehold estate, seisin, etc., applied to copyholds.

Devise by surrender to use of will—devise without surrender—the Wills Act, 1 Vict. c. 26.

Descent in customary tenure.

The power of the lord to grant or admit to land to be held by copy is regulated strictly by the custom of the manor. The estate sanctioned by custom is in some instances an estate of inheritance, in some instances only for a term of life or lives or for a term of years; and in the latter cases it is sometimes attended with the right of renewal for new lives or for a new term of years (*a*). A grant for lives in some manors imports by custom that the persons named take in succession (*b*). The customary estate.

A custom admitting of an estate in fee impliedly admits of any less estate, as for life or for years (*c*). So, a custom admitting of an estate for three lives impliedly admits a limitation for one (*d*). A custom admitting an estate for life, admits of an estate *durante viduitate* (*e*). And it seems that a custom to grant for years would warrant a grant for a term of years, if the grantee should so long live (*f*).

(*a*) *Paget's Case*, Cro. Jac. 671; Co. Cop. s. 41, 47; 1 Watkins by Coventry, 71 n. (1).

(*b*) *Podger's Case*, 9 Co. 104 *a*; *Doe v. Goddard*, 1 B. & C. 522; *Jeans v. Cooke*, 27 L. J. C. 202.

(*c*) Co. Lit. 52 *b*; Co. Cop. s. 47;

4 Co. 23 *a*, *Brown's Case*.

(*d*) *Smartle v. Penhallow*, 2 L. Raym. 994; and see *Gravenor v. Brook*, ib. 997.

(*e*) *Down v. Hopkins*, 4 Co. 29 *b*.

(*f*) 1 Watk. Cop. by Coventry, 66, n.

Limitations of
the uses of sur-
renders.

The copyholder may, in general, surrender to the use of another for his own estate and interest, or any less estate within the custom. The uses of a surrender may be limited in fee simple, or for term of life, or years ;—for a particular estate with remainder over ;—and if for a particular estate only, the reversion, upon determination of that estate, continues in the surrenderor and not in the lord (a).

Construction of
limitations.

The limitation of the uses of a surrender is generally framed in the same technical terms, and is subject to the same rules of construction, as the limitation of estates in a conveyance of the freehold at common law. Thus, a surrender to the use of a person in general terms, without words of inheritance, passes an estate for life only, and the limitation “to the heirs” must be added in order to authorise an admittance in fee (b). By special custom a fee simple may be created without the word ‘heirs’ as by such words as “*sibi et suis*,” ‘*sibi et assignatis*,’ or the like (c).

The rule in *Shelley’s* case applies to the limitations of copyholds ; and if a grant or surrender be made to the use of a person for life with a remainder to his heirs, the limitation to the heirs is referred to the estate of the ancestor, and enlarges it to an inheritance (d).

The surrender to the lord is general without expressing any estate, for that he is but an instrument to admit the surrenderee, and no more passes to the lord but to serve the limitation of the use ; the surrenderee, when he is admitted, is in by him that made the surrender and not by the lord (e).

(a) Lit. s. 74 ; Co. Cop. s. 47 ; 4 Co. 23 a ; 4 Co. 29 b ; 9 Co. 107 a.

(b) Co. Lit. 59 b ; Co. Cop. s. 49 ; Scriven, 146 ; “The construction of a surrender must be the same as if the estate had been limited by feoffment, or any other deed, and must be alike governed by the same rules

of common law.” Per Holt, C. J., 1 P. Wms. 77 in *Idle v. Cook* ; and see Ib. 16, *Fisher v. Wigg*.

(c) 4 Co. 29 a, b, *Bunting v. Lepingwell*.

(d) *Ante*, p. 34 ; Fearne, C. R. 60.

(e) Co. Lit. 59 b.

Where the custom admits of an estate by copy to a person and his heirs, it also admits of a grant or surrender to a person and the heirs of his body, or the heirs male of his body, or the like special lines of heirs ; the construction and effect of which limitations depend upon the custom of the manor (a). Fee simple conditional.

Limitations of this kind applied to the freehold were construed at common law as fees simple conditional ; and the statute *De donis* converted them into estates tail. The construction of the common law was generally, though not universally, followed in the manorial courts ; and as the statute *De donis* did not apply to copyholds, these limitations, in general, retain the construction of fees simple conditional at the present day. Accordingly, the copyholder admitted under such a limitation, if he has issue, and after his death his heir admitted by descent, has full power to surrender for an estate in fee simple ; but, if that power be not exercised, the estate is determinable by the failure of issue ; and though no remainder can be limited after such an estate, there is a reversion or possibility of reversion in the surrenderor (b).

In those manors, however, in which the construction of the common law was not followed, such limitations were taken to confer successive estates upon the issue designated in the grant, *per formam doni*, according to the primitive construction or, at least, intention of such grants, which was restored and rendered effectual, as to the freehold, by the statute *De donis*. Hence in some manors by special custom limitations “to the heirs of the body,” etc., create Estates tail by special custom.

(a) “Where the custom is that copyhold lands may be granted to any person *in feodo simplici*, a grant to one and his heirs of his body is within the custom : for be it a fee simple conditional, or an estate tail, it is within the custom.” 4 Co. 23 a, *Brown's Case* ; and see 3 Co. 9 a, *Heydon's Case*.

(b) *Ante*, p. 35, 37 ; *Doe v. Clark*, 5 B. & Ald. 458 ; *Doe v. Simpson* 4 Bing. N. C. 333 ; 3 M. & G. 929, in the latter case the fee simple conditional and the reversionary interest became united in the same person, who thereby became seised of the fee simple absolute.

estates tail, analogous to estates tail of freehold since the statute (a).

Proof of custom
of entail.

Amongst the proofs of such a special custom of entail are,—“If a remainder have been limited over such estates and enjoyed; or if the issues in tail have avoided the alienation of the ancestor; or if they have recovered the same in writs of *formedon* in the discender”; or if the tenant be permitted by the custom to alien before issue born, in prejudice to the right of reverter; all which incidents are inconsistent with a fee simple conditional. On the other hand, where such remainders are not allowed, or the power of alienation originates with the birth of issue, the estate is of the nature of a fee simple conditional (b).

Modes of barring
estates tail.

An estate tail in copyhold might be barred, according to the custom:—by a recovery in the customary court of the manor;—by forfeiture to the lord and regrant;—and in the absence of any other customary mode of barring it, it might be barred by a surrender (c). The statute 3 & 4 Will. IV. c. 74, which abolished fines and recoveries and now regulates the barring of estates tail, extends to copyholds and provides (sect. 50) that the disposition barring the legal estate tail must be by surrender.

Uses limited in
futuro and upon
contingency.

The limitation of the uses of a surrender is not restricted by the rules concerning the seisin which prevail in freehold tenure, for the freehold remains vested in the lord. Hence the use may, in general, be limited for an estate to commence *in futuro*, though freehold in quantity; and such estate may be limited to arise upon conditional terms or contingent events. So, a contingent remainder may be limited without a prior vested estate of freehold; and though a contingent remainder would fail, if it had

Contingent re-
mainder.

(a) Co. Lit. 60 b; 3 Co. 8 a, b, *Heydon's Case*; Scriven Cop. 4th ed. 54; see *ante*, p. 32, 35.

(b) Co. Lit. 60 b; Scriven Cop. 55, 4th ed.

(c) 1 Scriven Cop. 56, 60; “If by custom copyhold may be entailed,

the same by like custom by surrender may be cut off.” Co. Lit. 60 b. An enfranchisement or conveyance of the freehold in fee simple to the customary tenant in tail also has the effect of barring the entail. Scriven, p. 66; *post*, p. 98.

not become vested at the time appointed by the terms of limitation for taking effect in possession, yet it would not be destroyed by the premature determination of the prior estate, as by surrender or forfeiture, for remainders in copyholds are not thereby accelerated as in freeholds. So, the use may be limited in defeasance or substitution of prior uses. The lord is bound to admit according to uses limited in the above forms, though such limitations are not admissible in a conveyance operating at common law (a).

The surrender may also be made to such uses as some other person shall appoint, under a power or authority given to him for that purpose. The lord is not bound, without a special custom in the manor, to accept a surrender containing a power of appointment of the uses; but, if he does accept such a surrender, he is bound to recognise and admit the appointee (b). The appointees of uses under the power take their title from the surrender and not from the appointor, and it is not necessary that the latter should be admitted in order to give validity to the uses, although he take an estate until and in default of appointment (c).

As the conveyance operates though the medium of the lord by surrender to him and admittance of the new tenant, a copyholder is thus enabled to make a surrender to his own use and take an admittance of a new estate; so he may surrender to the use of his wife;—limitations which were void of effect at common law (d).

(a) *Ante*, p. 47, 48; Co. Cop. s. 35; 9 Co. 107 a, *Podger's Case*; *Fearne*, C. R. 319, 320; *Scriven*, Cop. 401, 403. There was formerly a question as to the validity of future and shifting uses of copyholds, but it seems to be conclusively settled in favour of their validity. See *Scriven* Cop. 159, & *auth.* there cited; 1 *Watk. Cop. by Coventry*, 210 n. (1); *Burton Compend.* (1280); *R. v. Oundle*, 1 A. & E. 283; *Boddington*

v. Abernethy, 5 B. & C. 776.

(b) *Boddington v. Abernethy*, 5 B. & C. 776; *Flack v. Downing College*, 13 C. B. 945; 22 L. J. C. P. 229.

(c) *R. v. Oundle*, 1 A. & E. 283; *Glass v. Richardson*, 2 D. M. & G. 658; 22 L. J. C. 105.

(d) *Ante*, p. 51, 52; Co. Cop. s. 35; 4 Co. 29 b, *Bunting v. Lepingwel*; *Brooks v. Brooks*, Cro. Jac. 434.

Lease for years,
—at common
law.

By the general custom of copyholds a tenant may make a lease for one year to take effect at common law without a surrender and without the licence of the lord; and by special custom or by licence of the lord he may make such a lease for a longer term. The lessee under such lease has a common law and not a copyhold interest; he is tenant to the copyholder only and not to the lord, and does not require admittance. The copyholder may also lease by a surrender to the use of the lessee for any term of years without licence or special custom, under his general power of disposition of the copyhold; and the surrenderee must then be admitted and becomes tenant by copy to the lord and not to the copyholder (a). A lease made at common law against the custom and without licence is good against all parties except the lord; as against him it is ground of forfeiture, which he may enforce or waive (b).

Lease by sur-
render.

Freehold, seisin,
etc., applied to
copyholds.

The term *freehold* as expressing the quantity or duration of estates admissible in freehold tenure, namely, estates for life and of inheritance, is applied by analogy to estates of customary tenure and distinguishes such estates from leasehold or terms of years; but the *freehold* as expressing the tenure of the land is in the lord, and not in the customary tenant (c). So the possession of a copyholder for an estate freehold in quantity is commonly termed the customary *seisin*, and the copyholder is said to be *seised* of such estate; though the terms are strictly applicable only to the possession of the freehold tenant. But there can be no *disseisin*, technically so called, with its peculiar consequences, of a customary tenancy (d).

Devise by sur-
render to the use
of will.

By general custom a copyholder in fee might surrender to the use of his will, and by his will declare and limit

(a) Co. Cop. s. 51; *Melwich's Case*, 4 Co. 26 a; *Earl Bath v. Abney*, 1 Burr. 206; *Doe v. Lufkin*, 4 East, 221.

(b) *Doe v. Bousfield*, 6 Q. B. 492;

see *post*, p. 91, 92.

(c) See *ante*, p. 71.

(d) Co. Cop. ss. 14-17; see 4 Co. 22 b, *Brown's Case*; 1 Swanst. 580, *Prebble v. Boghurst*; *ante*, p. 56.

the uses. The land then passed by the combined effect of the surrender and will, as if the uses declared by the will had been inserted in the surrender; and the appointee or devisee, upon the death of the testator, was in the position of a surrenderee. Under the will a further power of appointing the uses might be created (*a*).

Copyhold land was thus devisable, independently of the statutes of wills, which did not extend to copyholds, and without any other formalities than those, if any, prescribed by the terms of the surrender for the appointment of the uses (*b*).

By special custom a copyholder might devise without a surrender to the use of his will (*c*). In the absence of such custom, a will, without the surrender, was void of effect at law. The Court of Chancery, however, exercised a jurisdiction to supply a surrender, or rather to compel the heir to surrender, in support of wills devising to a wife, child, or creditors, which would otherwise have failed for want of the surrender (*d*). It seems that there could not be a special custom against surrendering to the use of a will, because it is implied in the general power to surrender (*e*).

The statute 55 Geo. III. c. 192, dispensed with the necessity of a surrender to the use of a will; and by the recent Wills Act, 1 Vict. c. 26, (repealing the above Act, see sect. 2,) the general power to dispose of real estate by will thereby given is extended "to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or may not have been admitted thereto, or notwithstanding that the same in consequence of any special custom could not

Devise by special custom without surrender.

Surrender supplied in Chancery.

Power to dispose by will without surrender and without admittance.

(*a*) *Holder v. Preston*, 2 Wils. 400; see *Glass v. Richardson*, 2 D. M. & G. 658; 22 L. J. C. 105.

(*b*) Hargrave's note to Co. Lit. 111 b; *Tuffnell v. Page*, 2 Atk. 37; *Att.-Gen. v. Andrews*, 1 Ves. sen. 225; *Doe v. Danvers*, 7 East, 299;

Phillips v. Phillips, 1 M. & K. 649, 664.

(*c*) Scriven, 212, 236.

(*d*) Scriven, 216-218; 1 Jarman Wills, 612.

(*e*) *Doe v. Llewellyn*, 2 C. M. & R. 503.

have been disposed of by will, if this act had not been made" (sect. 3). The Act provides for the payment of the stamps, fees and fines, which would have been payable on the admittance of the testator and surrender by him (sect. 4). And if the land could not have been devised except under the Act, the same fines and dues are to be payable to the lord as upon a descent (sect. 5). The will must be signed and attested in the manner required by the Act (sect. 9), and is to be entered upon the Court Rolls (sect. 5).

Descent in
customary
tenure.

The common law rules of descent, as amended by the Inheritance Act, apply to inheritances of customary and copyhold tenure, subject to the variations of special customs (a). The Inheritance Act extends to all hereditaments "whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law or according to the custom of Gavelkind or borough English, or any other custom" (b).

SECTION III. RIGHTS AND REMEDIES INCIDENT TO CUSTOMARY TENURE.

Rights of copyholder incident to possession—special custom to take minerals, timber, etc.

Remedies of copyholder—trespass—ejectment—mandamus to compel admittance—bill in chancery.

Rights of lord—seizure to compel admittance—suit to ascertain boundaries.

Fines on admittance, etc.—fees to steward.

Fealty and services of customary tenure.

Escheat—forfeiture—waiver of forfeiture.

Rights of copyholder incident to possession.

The customary tenant, as being tenant at will, has all the rights of enjoyment incident to the mere possession ;

(a) Co. Cop. s. 50 ; 4 Co. 22 a, to customary descent and the effect of special customs, see *post*, Part IV. Chap. III. 'Descent,'
Brown's Case.
(b) 3 & 4 W. IV. c. 106, s. 1 ; as

but the rights of property, subject to the possessory rights of the tenant, remain in the lord. Consequently, by the general custom of copyholds the tenant can do no act of waste or detriment to the land, as cutting timber, or taking and carrying away the soil or minerals; and by reason of his possessory right he may prevent any other person, even the lord, from doing such acts; and he may maintain an action of trespass for such acts done without his licence (a). The lord, in the absence of a special custom to that effect, has no right to enter upon the possession of the tenant to cut the trees (b), or to take the minerals, (c) although the proprietary right remains in him.

By special custom in a manor the copyhold tenants may have the right, absolute or qualified, of getting and carrying away the minerals or cutting the timber within their tenements (d).

Special custom
to take minerals,
timber, etc.

The copyholder's remedy for the recovery of his tenement was originally by a plaint in the nature of a real action in the customary court of the manor; he had no real action in the superior courts of common law, because he had no freehold title (e). He might maintain trespass, in right of his possession, in the common law courts, and even against the lord; he might also maintain ejectment through his lessee, founded on his power of giving a common law lease, and the latter form of action became the ordinary mode of recovering copyhold lands (f). Now all plaints in the nature of real actions,

Remedies of
copyholder.

Trespass.

Ejectment.

(a) *Lewis v. Branthwaite*, 2 B. & Ad. 437; *Keyse v. Powell*, 2 E. & B. 132; 22 L. J. Q. B. 305; see *Bowser v. Maclean*, 2 De G. F. & J. 415; 30 L. J. C. 273.

(b) *Haydon v. Smith*, 13 Co. 67; *Whitechurch v. Holworthy*, 4 M. & S. 340; 19 Ves. 213; *Lewis v. Branthwaite*, supra.

(c) *Bp. Winchester v. Knight*, 1 P. Wms. 406; *Bourne v. Taylor*, 10 East, 189; see *Hext v. Gill*, L. R.

7 Ch. 699; 41 L. J. C. 761.

(d) *Curtis v. Daniel*, 10 East, 273; *Marquis Salisbury v. Gladstone*, 9 H. L. C. 692; 34 L. J. C. P. 222; *Hammer v. Chance*, 34 L. J. C. 413. As to rights of taking timber for repairs, wood for fuel, etc., see *post*, Part III. Chap. I.

(e) Lit. s. 76; Co. Cop. s. 51.

(f) Lit. s. 77; Co. Lit. 61 a; *Melwich's Case*, 4 Co. 26 a; 1 J. & W. 549, *Widdowson v. Harrington*.

in common with real actions at common law, are taken away by the 3 & 4 Will. IV. c. 27, s. 36 (a); and the only remedy is by action of ejectment.

Mandamus to compel lord to admit, accept surrender, etc.

The copyholder's remedy against the lord, as to surrender and admittance, is by writ of mandamus at common law (b). A claimant is entitled to admittance on a *prima facie* title, in order to give him the opportunity of asserting it, as the admittance is effectual only according to the validity of the title (c); and he cannot, in general, bring ejectment without a legal title by admittance (d).

Jurisdiction of Chancery to compel admittance.

The Court of Chancery also exercises a like jurisdiction to compel admittance, and originally, it seems, the jurisdiction was in the Court of Chancery only. The claimant may file a bill in Chancery for this purpose; but it is more usual now to proceed at common law by mandamus (e). The Court of Chancery will not assist a claimant to obtain a bare legal title by admittance, if he cannot show any equitable interest to support it (f).

Rights of the lord.

The lord is entitled to have a tenant upon the rolls, and may by general custom seize and retain the tenement *quousque*, until the tenant comes in and is admitted (g). The seizure *quousque* is in the nature of process to compel admittance; but by special custom the lord may be entitled to seize absolutely for want of a tenant, as he may for a forfeiture (h).

Seizure *quousque* to compel admittance.

The lord being in possession under such seizure, the tenant must take proceedings to recover the tenement

(a) See *ante*, p. 59.

(b) Scriven, 525: *R. v. Rigge*, 2 B. & Ald. 550; *R. v. Brewer's Co.* 3 B. & C. 172.

(c) *R. v. Coggan*, 6 East, 431; *R. v. Henham*, 5 A. & E. 559.

(d) *Doe v. Hall*, 16 East, 208. A customary heir entitled by descent may bring ejectment without having been admitted. Scriven, 290.

(e) Scriven, 533; *Andrews v.*

Hulse, 4 K. & J. 392; 27 L. J. C. 655; *Walters v. Webb*, L. R. 9 Eq. 83, 87; 39 L. J. C. 414, 416.

(f) *Williams v. Lonsdale*, 3 Ves. 752; *Widdowson v. Earl Harrington*, 1 J. & W. 532.

(g) See *Doe v. Trueman*, 1 B. & Ad. 736; *Doe v. Muscott*, 12 M. & W. 832.

(h) *Doe v. Hellier*, 3 T. R. 162; see *post*, p. 92.

within twenty years, otherwise his claim will be barred by the Statute of Limitations (*a*).

The lord has no remedy in equity merely to compel admittance; but if he cannot exercise his legal remedy of seizure by reason of confusion of the boundaries of the copyhold tenement, he may maintain an auxiliary suit in Chancery for a discovery of the boundaries and may have a commission appointed to ascertain and set out the boundaries, if it be necessary (*b*). It is the duty of the tenant to maintain the boundaries, and keep the lord's property distinct (*c*).

By general custom the lord is entitled to a fine upon the admission of a tenant. The amount of the fine may be fixed by the custom of the manor; if not so fixed, it is arbitrary, but in such case must be reasonable, which is held to be not exceeding two years improved value of the land (*d*). The restriction of the fine to what is reasonable applies only when the lord is compellable to admit, and not to a voluntary grant, as after a forfeiture; for then the fine is purely arbitrary (*e*).

The lord cannot refuse admittance until the fine is paid, for the fine is not due until admittance (*f*). But he may refuse admittance, if previous fines in respect of the same title remain unpaid (*g*).

By special custom a fine may be due upon a change of the lord by death. A custom to have a fine upon a change of the lord by alienation or other act of the party would be unreasonable and bad (*h*).

(*a*) 3 & 4 Will. IV. c. 27, s. 2; *Walters v. Webb*, L. R. 5 Ch. 531; 39 L. J. C. 677.

(*b*) See *Scriven*, 534; *Clayton v. Cookes*, 2 Atk. 449; see *Att.-Gen. v. Stephens*, 6 D. M. & G. 111; 25 L. J. C. 888.

(*c*) See *Att.-Gen. v. Fullerton*, 2 V. & B. 263; *Brown v. Wales*, L. R. 15 Eq. 142.

(*d*) Co. Lit. 59 b; Co. Cop. s. 56;

Hobart v. Hammond, 4 Co. 28 a; *Willowe's Case*, 13 Co. 1; *Grant v. Astle*, Dougl. 727 n.; *Scriven*, 317, 319.

(*e*) 13 Co. 3, *Willowe's Case*.

(*f*) 4 Co. 28 a; *R. v. Hendon*, 2 T. R. 484; see *Graham v. Sime*, 1 East, 632; and see *post*, p. 91.

(*g*) *R. v. Coggan*, 6 East, 431; *R. v. Dullingham*, 8 A. & E. 858.

(*h*) Co. Lit. 59 b; *Lowther v.*

Fines for
licences.

By special custom fines may be due upon licences granted to the copyholder to make leases, or to do other acts; but by general custom fines are due only upon admittances. Where the fines for such licenses are certain, the lord may be compelled to grant them (a).

Fees to steward.

Fees are due by custom to the steward of a manor for his official services in regard to surrenders, admittances, copies of the rolls, and the like. The amount of the fees is in some cases fixed by the custom; in the absence of customary assessment the steward is entitled to claim a reasonable remuneration for his services (b).

Fealty and ser-
vices.

By the general rules of customary tenure the lord is also entitled to fealty and suit of court; and by special custom or by express reservation he may be entitled to rents, reliefs, and heriots. "The doing of fealty by a copyholder proveth that a copyholder, so long as he observes the customs of the manor and payeth his services, hath a fixed estate; for tenant at will, that may be put out at pleasure, shall not do fealty" (c).

Escheat.

The lord may become entitled to the land by *escheat* upon the death of the tenant without leaving an heir and without having disposed of the tenement by will. By escheat the copyhold estate is merged or extinguished in the freehold, with all its incidents, of customary descent and the like; but it retains the capacity of being held by copy and may be re-granted in that form of tenure (d).

Forfeiture.

Forfeiture is the consequence of certain acts of the tenant which are inconsistent with the customary tenure or are violations of its rules (e). The alienation of the land by a conveyance operating at common law and purporting to convey an estate of freehold tenure, operates

Raw, 2 Bro. P. C. 451; *Duke of Somerset v. France*, 1 Strange, 654.

(a) Co. Cop. s. 56; Scriven, 458, 4th ed.

(b) Scriven, 392; see *Allen v.*

Aldridge, 5 Beav. 401.

(c) Co. Lit. 63 a; see Scriven, 361; *ante*, p. 26.

(d) See *ante*, p. 28; *post*, p. 93.

(e) Co. Cop. s. 57; Scriven, 437.

as a disseisin of the lord and a forfeiture (*a*). A deed conveying lands and tenements at common law will be construed, if possible, to apply to freehold lands only in order to avoid a forfeiture of copyhold (*b*).

A lease at common law for more than a year, unless it be made with the licence of the lord or under a special custom to lease in that manner, operates as a ground of forfeiture (*c*.) A document will be construed as a mere agreement for a lease instead of an operative lease, if possible, to avoid this effect (*d*).

Any acts of waste, injurious to the inheritance, whether permissive or voluntary, if there be no custom to the contrary, are cause of forfeiture; as pulling down a building, or suffering it to be out of repair, ploughing meadow, cutting trees, digging and removing minerals, removing fences and confounding boundaries, and the like (*e*).

By special custom a refusal to take admittance may operate as a forfeiture and entitle the lord to seize absolutely and not merely *quousque*, as by the general custom (*f*.) A refusal to pay the proper fines or rent or to do the services of the tenure upon demand is ground of forfeiture (*g*.) There were other causes of forfeiture, as attainder which followed upon judgment for treason or felony, whereby the tenant became incapacitated to fill the tenancy and it reverted to the lord (*h*).

Some acts of forfeiture operate by destroying the copyhold tenure, as conveyances which transfer the land to

Operation of forfeiture.

(*a*) Lit. s. 74; Co. Lit. 59 *a*; 4 Co. 21 *b*.

(*b*) Co. Cop. s. 58.

(*c*) *Ante*, p. 84; Co. Lit. 59 *a*; Hargrave's note, *ib*.; *Doe v. Lufkin*, 4 East, 221.

(*d*) *Doe v. Clare*, 2 T. R. 739; *Fenny v. Child*, 2 M. & S. 255.

(*e*) Co. Lit. 63 *a*; Hargrave's note, *ib*.; Co. Cop. s. 57; *Doe v. Clement*, 2 M. & S. 68; *Doe v. Earl of Burlington*, 5 B. & Ad. 507.

(*f*) *Ante*, p. 88; *Doe v. Hellier*, 3 T. R. 62.

(*g*) Co. Cop. s. 57; *Willowe's Case*, 13 Co. 1; see *Grant v. Astle*, Dougl. 726 *n*.; fines may also be recovered by action of debt. 1b. 727; and see *ante*, p. 89.

(*h*) *R. v. Mildmay*, 5 B. & Ad. 254; *R. v. Willes*, 3 B. & Ald. 510. The 33 & 34 Vict. c. 23, s. 1, enacts that no judgment for any treason or felony shall cause any attainder or any forfeiture or escheat. It seems worthy of remark that this Act makes no mention of copyholds. See *ante*, p. 78.

another for a freehold estate, for such an estate is wholly inconsistent with the copyhold tenure and is a disseisin of the lord's freehold. A forfeiture of this kind formerly occurred upon a conveyance by feoffment with livery, and upon conveyance by fine or recovery; and it may still occur by a conveyance transferring a freehold estate at common law (a).

Other acts operate as forfeitures only at the election of the lord, by entitling him to enter and seize the tenement; such are leases without licence, acts of waste, refusal of services and the like. As to these acts the forfeiture may be waived, and the lord is taken to do so by any acknowledgment of the tenancy continuing after notice of the act, as by accepting or distraining for rent, accepting a surrender or the like; and if he does not himself enforce the forfeiture, it is taken as waived as against the succeeding lord. Hence no lord can take advantages of such acts of forfeiture, but he who is lord at the time of the act committed. But the forfeiture produced by an act which destroys the copyhold cannot be waived; and a succeeding lord, under the same title, may exercise the right to enter and seize absolutely (b).

A forfeiture extends to the whole of the tenement as to which the act is committed; but not to other separate tenements held by the copyholder of the same manor. It is confined to the estate of the forfeiting tenant and does not affect estates in remainder or reversion, which will take effect in the time and order prescribed by the terms of limitation, notwithstanding the forfeiture of the particular estate (c).

Waiver of forfeiture.

Extent of forfeiture.

(a) *Ante*, p. 57, 72.

(b) Co. Cop. s. 60, 61; *Doe v. Hellier*, 3 T. R. 162; *Doe v. True-*

man, 1 B. & Ald. 736, 744.

(c) Co. Cop. s. 59; 9 Co. 107 a, *Podger's Case*.

SECTION IV. EXTINGUISHMENT OF CUSTOMARY TENURE ; REGRANT ; ENFRANCHISEMENT.

Union of copyhold and freehold titles—surrender to lord—for particular estate—to lord having a particular estate.

Copyholder acquiring estate in the freehold—or in the manor.

Severance of the tenement from the manor.

Regrant of copyhold—must conform with the custom—regrant is voluntary.

Enfranchisement—to copyholder for life or years—to copyholder in tail—no tenure or services can be reserved—statutes to facilitate enfranchisement.

A customary estate is extinguished by the union of the freehold and customary title in the same person. The possession is then referred to the freehold title only, and may be disposed of under that title at common law.

Union of copyhold and freehold titles.

The customary title may vest in the lord, by surrender to his use, or release to him ; also by escheat or forfeiture. It thereby becomes extinguished, though the tenement, in the hands of the lord, may retain the quality of being demisable upon the customary tenure, and may be regranted by him as copyhold (a).

Surrender to use of lord.

A surrender to the lord for a particular estate suspends the tenure during that estate only ; and the customary tenant in remainder continues entitled according to the terms of his estate. For remainders, whether vested or contingent, are not accelerated or barred by the surrender or forfeiture of the particular estate, as was the case with like limitations of the freehold (b).

Surrender for particular estate.

A surrender to a lord having a particular estate or limited interest in the manor operates as an extinguish-

Surrender to lord having particular estate.

(a) Scriven, 544, 545 ; as to regrant, see *post*, p. 95.

Podger's Case ; Scriven, 403 ; *Fearne, C. R.* 319.

(b) See *ante*, p. 57 ; 9 Co. 107 a,

ment (subject to a re-grant by copy) in favour of all persons having ulterior estates in the manor (a).

Extinguishment
by copyholder
acquiring estate
under the free-
hold title.

Copyholder ac-
quiring the
manor.

The freehold and customary title may also become united in the tenant. If the copyholder accepts a lease or other common law estate under the freehold title of the tenement, his copyhold interest, being a tenancy at will only relatively to such estate, is merged or extinguished absolutely. So, if the copyholder acquires by any means an estate in the manor, which includes the copyhold tenement, his copyhold interest is extinguished; but in this case, as lord of the manor, he would have the right to re-grant the tenement to be held by copy (b).

Severance of the
tenement from
the manor.

If the lord conveys away the freehold title in a copyhold tenement, so that it is no longer parcel of the manor, the customary tenure is extinguished, except as to the rights of the copyholder. The rents and services reserved may continue due to the grantee of the freehold, but the rights incident to the lord, as such, namely, suit of court, fines upon admittance, and the like are extinguished. They cannot be conveyed with the freehold of the tenement, except as parcel of the entire manor; for "a manor is an entire thing, and not severable," at least by act of the party; nor can a new manor be created at the present day. The copyholder may afterwards release to the grantee of the freehold or may take a release from him, and so unite the titles; and this seems the only mode of dealing with the legal title of a tenement so circum-

(a) *St. Paul v. Lord Dudley*, 15 Ves. 157, where the lord was tenant for life of the manor; *King v. Moody*, 2 Sim. & Stu. 579, where the lord was tenant in fee subject to an executory devise. But see *Bingham v. Woodgate*, 1 Russ. & My. 32, where the conveyance of a *customary freehold* in fee to the tenant for life of the manor, was held to suspend

the tenure during his life only, and upon his death the customary tenement descended to his heir, while the seignory revived in the succeeding lord in remainder; and see Co. Lit. 313 a, there cited.

(b) *Scriven*, 547; *Lane's Case*, 2 Co. 16 b; 4 Co. 31 a, *French's Case*; 4 Co. 31 b, *Hide's Case*.

stanced ; for it can no longer be conveyed by surrender, because the land is no longer parcel of the manor (*a*).

Where the copyhold tenement reverts to the lord, which may happen, as already noticed, in various ways :—by surrender to the use of the lord,—by expiration of the copyhold estate, as where it is for lives only, and the lives have expired,—by escheat or failure of heirs,—by forfeiture ; —though the possession is then referred to his freehold title, and he may dispose of the tenement under that title by a common law conveyance ; yet he may, if he pleases, grant it out again to be held by copy according to the custom of the manor (*b*).

Regrant of copyhold.

In like manner, where the copyhold tenure is extinguished by the copyholder acquiring an estate in the manor, as lord of the manor he may again grant the tenement to be held by copy (*c*).

The grant by copy is an exercise of his power as lord ; it does not take effect out of his estate and is not restricted thereby. Though entitled to the manor for a particular estate only, as for life or for years or at will, provided he is rightfully lord for the time being, he may grant the customary tenements to hold by copy ; and if the custom be strictly followed his grant will bind the inheritance of the manor. The copyholder under such grant is in by the custom ; his estate is independent of the freehold title of the manor, and is not affected by the charges and incumbrances attaching on that title (*d*).

Regrant is independent of the lord's estate.

(*a*) Co. Lit. 58 *b* ; 4 Co. 25 *a*, *Murrel's Case* ; 6 Co. 64 *a*, *Finch's Case* ; Scriven, 7–14. It is to be observed that the questions, whether a manor can be divided, and as to the effect of the conveyance of the freehold of a customary tenement to a stranger, appear very doubtful upon the authorities. The opinions of the best text writers seem to be as above stated. Scriven, *supra*. 1 Watk. Cop. by Coventry, 15–23, &

notes, *Ib*.

(*b*) Co. Cop. s. 62 ; *French's Case*, 4 Co. 31 *a* ; *ante*, p. 93.

(*c*) *Ib.* ; *ante*, p. 94.

(*d*) Co. Lit. 58 *b* ; Co. Cop. ss. 34, 41 ; 4 Co. 23 *b* ; *Swayne's Case*, 8 Co. 63 *b* ; *Doe v. Strickland*, 2 Q. B. 792. "Tenant for years, tenant by *elegit*, and tenant at will, guardian in chivalry, etc., who are not properly seised but possessed, are *domini pro tempore*, not only to

Regrant is dependent upon the lord's possession.

The lord retains the power of granting the tenement by copy so long as he retains possession; but by any interruption of his possession, unless it be wrongful, the customary quality or capacity of the copyhold is interrupted and consequently lost. Thus, if the lord makes a lease for years or for life or any other estate at common law, the land can never after be granted by copy by him or any persons claiming under him; but the power of those in remainder or reversion after him to grant by copy is not affected. If the lord is wrongfully disseised, and the land is afterwards recovered, it is again grantable by copy (a).

Regrant must conform strictly with the custom.

In such regrant the lord must conform strictly to the custom, as to the tenement, the estate granted, the incidents and appurtenances of the estate, the tenure, the rents and services reserved and all other points; for the grant being authorised only by the custom, deviation from the custom in any point would render it void (b).

Regrant by copy is voluntary.

The grant in such cases is voluntary and may be made for any estate within the custom; in this respect it differs from an admittance upon a surrender, which is a ministerial and compulsory act, directed and controlled by the uses of the surrender. An admittance, as conferring the

make admittance, but to grant voluntary copies of ancient copyhold lands which come into their hands;—and voluntary grants by copy, made by such particular tenants as is aforesaid, shall bind him that hath the freehold and inheritance, because all these be lawful lords for the time being; but so is not a tenant by sufferance, because he is in by wrong;—and therefore there is a diversity between disseisors, abators, intruders and others that have defeasible titles; for their voluntary grants of ancient copyhold lands shall not bind the disseisees or others that right have. But admittances made by disseisors, abators, intruders, tenants at sufferance or others that have defeasible

titles, stand good against them that right have, because it was a lawful act, and they were compellable to do them." Co. Lit. 58 *b*. *Dominus pro tempore* may grant by copy in reversion, if the custom permits it. Hargrave's note, *ib*.

(a) Co. Lit. 48 *b*; *French's Case*, 4 Co. 31 *a*; Scriven, 14, 98. So if the land is forfeited by the lord, or escheated, or extended, or assigned to his widow in dower, inasmuch as the interruptions are lawful, it can never after be granted by copy. *French's Case*, *supra*.

(b) Co. Cop. s. 41; Scriven, 94; see *Badger v. Ford*, 3 B. & Ald. 153; *Doe v. Strickland*, 2 Q. B. 792.

legal title, is equivalent to a grant and may be so pleaded ; but it has no force except as following the surrender, and an erroneous admittance cannot be supported as a voluntary grant (a). A grant entered upon the rolls imports an admittance or acceptance of the grantee as tenant (b).

A regrant, being voluntary, is not, like an admittance upon a surrender, restricted as to the fine or consideration to be paid for it ; but the lord, as he is at liberty to grant or not, may ask what he pleases (c). No restriction as to fine.

Enfranchisement is effected by the lord of the manor conveying the freehold title of the tenement in fee simple to the copyholder ;—the customary tenure is thereby wholly extinguished (d). An enfranchisement operates out of the lord's estate and not by exercise of his power as lord. It is therefore dependent upon his title to the manor, and can only be fully effected by a lord entitled in fee simple, or having a power of disposition to that extent. The conveyance of a less estate, or by a lord entitled for a less estate, would only give a limited title to the freehold ; though by accepting such less estate the copyholder's interest would be merged and extinguished (e). Enfranchisement.
By conveyance of freehold.

Enfranchisement or conveyance of the freehold in fee simple to a copyholder for life or for years operates as an enfranchisement for the benefit of those in remainder (f). But it so operates in equity only ; the legal estate in fee simple rests in the grantee and will pass to his heir or To copyholder for life or years.

(a) Co. Cop. s. 41 ; 4 Co. 22 b ; 2 B. & Ald. 457, *Roe v. Loveless* ; *Zouch v. Forse*, 7 East, 186.

(b) Co. Cop. 38 ; see *Roe v. Loveless*, 2 B. & Ald. 453 ; 2 Wms. Saund. 422 c ; *Doe v. Whitaker*, 5 B. & Ad. 409.

(c) 13 Co. 3 ; see *ante*, p. 89.

(d) Scriven, p. 550.

(e) See *ante*, p. 94 ; whether a release of all seignorial rights alone,

without conveyance of the freehold estate, operates as an enfranchisement of copyholds, see Scriven, 552. Such release is sufficient to enfranchise tenements held in ancient demesne, and customary freehold or tenant right estates analogous to ancient demesne. *Doe v. Huntingdon*, 4 East, 271 ; see *ante*, p. 77.

(f) 16 East, 415, *Roe v. Briggs* ; see *Doe v. Jackson*, 1 B. & C. 448.

devisee; and a conveyance will be decreed to those entitled in remainder, upon equitable terms as to the consideration paid for the enfranchisement (a).

To copyholder in tail.

Enfranchisement to a copyholder in tail bars the entail and all ulterior estates and limitations, and leaves no interest at law or in equity in the issue in tail or the remainderman (b).

No tenure or services can be reserved.

Upon an enfranchisement since the statute of *Quia emptores* no tenure or services can be reserved; because the grantee of the freehold holds of the next superior lord. Consequently, if the deed of enfranchisement purports to reserve a rent, it is not a rent-service, but in the nature of a rent-charge granted by the tenant (c).

Enfranchisement presumed.

An enfranchisement may be presumed in favour of a long possession and course of dealing with the tenement as freehold (d).

Statutes facilitating enfranchisement.

Statutes have been passed from time to time to facilitate the enfranchisement of customary tenures, at the instance either of the lord or of the tenant, providing for compensation for the rents and services by the payment of a gross sum or a fixed rent-charge (e).

(a) See *Wynne v. Cookes*, 1 Bro. C. C. 515; *Wilson v. Allen*, 1 J. & W. 611, 621.

(b) *Parker v. Turner*, 1 Vern. 393; *Dunn v. Green*, 3 P. Wms. 9; *Roe v. Briggs*, 16 East, 406; *Challoner v. Murhall*, 2 Ves. jun. 524.

(c) See *ante*, p. 19; *Bradshaw v. Lawson*, 4 T. R. 443; *Scriven*, 558.

(d) *Roe v. Ireland*, 11 East, 280.

(e) 4 & 5 Vict. c. 35, amended by 6 & 7 Vict. s. 23 and 7 & 8 Vict.

c. 55; 15 & 16 Vict. c. 51, providing for compulsory enfranchisement; 21 & 22 Vict. c. 94, substituting a new mode of compulsory enfranchisement. See Chitty's Statutes; *Scriven*, 550, Appendix. As to the principles upon which compensation to the lord is to be calculated, see *Arden v. Wilson*, L. R. 7 C. P. 535; 41 L. J. C. P. 273, & cases there cited; *Reynolds v. Woodham Walter*, L. R. 7 C. P. 639; 41 L. J. C. P. 281.

CHAPTER III.

THE LAW OF USES.

- Section I. Uses before the Statute of Uses.
- II. Uses since the Statute of Uses.
- III. Operation and limits of the Statute of Uses.

SECTION I. USES BEFORE THE STATUTE OF USES.

Origin and nature of Uses.

Uses at law—possession of *cestui que use*.

Uses in equity—enforced by *subpœna*—not subject to rules of tenure—assignment of uses—disposition by will—descent.

Statutes concerning uses—the Statute of Uses.

The law of freehold tenure above described was administered in the courts of common law. A concurrent ^{Uses.} jurisdiction over property in land was exercised by the Court of Chancery in the system of Uses; which was subsequently, to a great extent, incorporated with the law of freehold tenure by the Statute of Uses.

The system of Uses was founded on the practice, ^{Origin and nature of uses.} adopted in early times for various purposes, of transferring the seisin or legal possession of the land by feoffment or other sufficient mode of conveyance to some person or persons upon a trust or confidence to permit the feoffor or some other person to have the *Use*. This trust was at first of a secret nature, and not mentioned in the charter of feoffment or instrument of conveyance; but afterwards a clause was commonly inserted expressing that the feoffees were to hold “*to the use*” of the person intended to be thereby benefited. The latter person became

known as the *cestui que use*, relatively to the legal feoffees who were commonly known as the *feoffees to uses* (a).

Uses at law.

The courts of law took no notice of the use or trust; they regarded the feoffee exclusively as tenant of the land for all purposes. His seisin or possession was subject to all the services and incidents of tenure, and was liable to escheat and forfeiture. He had the power to aliene the land by feoffment or other legal conveyance; and it passed by descent to his heir.

Possession of *Cestui que use*.

Cestui que use, as such, had no estate or interest in the land at law; and no remedy in a court of law against the feoffees to uses, nor against strangers. But while in possession, with the consent of the feoffees, he was in the legal position of a mere tenant at will (b).

Uses in equity.

In the Court of Chancery, on the other hand, the *use* imparted all the beneficial incidents of property, namely, the right of occupying and enjoying the land *in specie*, and of taking the profits, also the power of directing the disposal of it to another. The correlative *trust* imposed on the feoffee consisted in permitting the *cestui*

(a) In the feoffments collected in Madox's 'Formulare Anglicanum,' joint feoffees, which may be taken as the sign in early deeds of secret uses (see *post*, p. 102), appear first towards the end of the reign of Edward III., see forms 337, 49 Ed. III.; 389, 50 Ed. III.; 339, 13 Ric. II. The clause, "*ad usum*," appears first in the reign of Henry VII., see forms 353, 14 Hen. VII.; 354, 21 H. VII. Bacon refers the clause, "*ad opus et usum*," to the reign of Ric. II.; Bacon on Uses, 22, Rowe's ed. note (41); and see 1 Sanders on Uses, ch. 1.

Perkins speaks of uses before the statute *quia emptores*, 18 Edw. I., but it seems only by way of illustrating the effect of tenure in rebutting a resulting use, and without meaning to assert the fact of the practice of uses existing at that early period. Before that statute,

he says (probably meaning only *without* that statute), if tenant in fee simple enfeoffed a stranger without any consideration, and without expressing any use, there could be no resulting use in the feoffor, because the tenure and services supplied a consideration to carry the use to the feoffee. Perkins, s. 529; see *post*, p. 108.

Coke states that during the wars between the houses of York and Lancaster, the greater part of the lands in England were in use. Co. Lit. 272 a. And according to Bacon, from 11 Henry VI. to 1 Ric. III., being the space of fifty years, uses were most favoured. Bacon Uses, p. 27.

(b) Lit. ss. 462, 463, 464; Co. Lit. ib.; Butler's note (1) to Co. Lit. 271 b, sect. ii.; 1 Co. 121 b; 1 Sanders on Uses, 66, 68, 4th ed.; Bacon Uses, 20, Tracts, p. 316.

que use to occupy and take the profits, in preserving the legal title on his behalf, and in executing conveyances of the land according to his direction (a).

The Court of Chancery exercised jurisdiction over the use by giving to the *cestui que use* the remedy by *subpœna* against the feoffee to compel him to disclose and perform the use or trust upon which he held the land (b). The Court of Chancery also in course of time enforced the trust against the heir of the feoffee to uses taking the land by descent; also against a purchaser from the feoffee to uses taking the land with notice of the trust, or without consideration. But a purchaser for a valuable consideration and without notice of the trust held the land free of any claim in equity on the part of the *cestui que use*, whose remedy in such case lay against the feoffee only, for the breach of trust committed in parting with the land (c).

Accordingly, a use was summarily defined by Coke in the following terms:—"A use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cestui que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by *subpœna* in Chancery" (d).

By these means the use or beneficial ownership of the land was withdrawn altogether from the rules of tenure

Enforced in
Chancery by
subpœna.

Uses not subject
to rules of
tenure.

(a) Co. Lit. 272 b; 1 Co. 121 a, b, *Chudleigh's Case*; Bacon on Uses, p. 10; in Tracts, p. 306; Sanders on Uses, c. 1.

(b) 1 Sand. Uses, 16, 20.

(c) 1 Co. 122 a, b, *Chudleigh's Case*; Bacon Uses, 15, Tracts, p. 312. See the progressive jurisdiction over uses stated by Lord Mansfield in *Burgess v. Wheate*, 1 Eden, 218, 219; and see 1 Spence, Eq.

Jur. 442, 445.

(d) Co. Lit. 272 b; see this definition developed and applied to trusts in Lewin on Trusts, c. 1. Compare the simpler and broader foundation of modern trusts since the Statute of Uses, as established by Lord Nottingham, and expressed in the maxim that the trust in equity is the land, *post*, p. 126.

and from the feudal dues and incidents, attaching to the legal estate. The legal ownership was still subject to these obligations, and though the regular services of the tenure could not be avoided and might be enforced against the land, yet by vesting the seisin in numerous feoffees jointly, whose number was from time to time renewed by a new feoffment to others upon the subsisting uses, it was kept almost entirely clear of the occasional charges which fell due by reason of descents, wardships, marriages, alienations and the like, and from the graver incidents of escheat and forfeiture (a).

Power of disposition over uses.

By these means also the use became disposable, according to the rules of equity and independently of the rules of law, except so far as they were followed in equity.—It was assignable without feoffment or deed, attornment, entry, or any other common law formality (b).—It was devisable by will, although the freehold was not so devisable. A feoffment might be made of lands to uses to be declared by will, and the will then took effect by declaring the uses (c).

Disposition by will.

Descent of Uses.

An estate of inheritance in the use descended, upon an intestacy, according to the rules of the common law, or

(a) Butler's note to Co. Lit. 191 a, sect. v. (11); Ib. 271 b, II.; see *ante*, p. 26; and see the preamble to the Statute of Uses, 27 Hen. VIII. c. 10, as to the subversion of the ancient laws of the realm by means of uses.

Besides the evasion of the rules of tenure, conveyances to uses were also employed in early times by religious persons or corporations to evade the Statutes of Mortmain, which prohibited such persons from purchasing land in their own right, until the statute 15 Ric. II. c. 5, brought uses also within the prohibition of those statutes. 2 Inst. 74; 1 Sanders on Uses, 16, 4th ed. According to Coke,—“There were two inventors of uses, fear and fraud; fear in times of troubles and civil wars to save their in-

heritances from being forfeited, and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, etc.” 1 Co. 121 b, *Chudleigh's Case*; or as variously stated—“the parents of the trust were fraud and fear, and a court of conscience was the nurse.” *Att.-Gen. v. Sands*, Hard. 491; see the various objects served by uses fully stated in St. German's ‘Doctor and Student,’ Dialog. 2, c. 22.

(b) 1 Sanders on Uses, 65. “There is no case in law whereby an action is transferred, but the *subpoena*, in case of use, was always assignable.” Bacon Uses, 16.

(c) Co. Lit. 111 b, 271 b; 1 Co. 123 b, *Chudleigh's Case*; 1 Sanders on Uses, 65; Bacon reckons this as one of the chief causes of uses. Bacon Uses, 20, Tracts, 315.

according to the special customs of descent, if any, to which the land was subject (*a*).

Statutes were passed from time to time bringing the use within legal cognizance for certain purposes, amongst which may be mentioned, as being the most important, the statute 1 Ric. III. c. 1, giving the *cestui que use* a direct power of conveying the legal estate (*b*); but the earlier statutes were superseded in effect by the statute 27 Hen. VIII. c. 10. (A.D. 1535) commonly known as the Statute of Uses, which was passed with the object of at once converting the use into legal possession (*c*).

Statutes relating to Uses.

The Statute of Uses.

The preamble of the statute recites that "where by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made *bond fide* without covin or fraud;—yet nevertheless divers subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents and trusts, and also by wills and testaments sometime made by nude parols and sometime by writing;—by reason whereof heirs have been unjustly disinherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids, and scantily any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or execution, for their rights titles and duties—to the utter subversion of the ancient common laws of this realm."

Preamble as to transfer at common law.

Evils resulting from Uses.

The statute enacts, by sect. 1, "that where any person

(*a*) Co. Lit. 14 *b*, 23 *a*; 1 Co. 88 *a*; 1 Sanders on Uses, 64.

(*b*) See Co. Lit. s. 272 *a*, *b*; Lit. s. 464; 1 Sanders on Uses, 23; see the statutes collected in Bacon on Uses, 24, Tracts, 320.

(*c*) "The title in course of pleading

is, *statutum de usibus in possessionem transferendis*." Bacon on Uses, 31, Tracts, 325. As to the intention of the statute, see 1 Co. 124 *a*, *Chudleigh's Case*; 2 Leon. 17, *Brent's Case*; and see 1 Sanders on Uses, 85; 1 Spence, Eq. Jur. 461.

Persons having the use for any estate shall be in lawful seisin of same estate as they have in the use.

Estate and possession of person seised to uses shall be deemed to be in them that have the use.

or persons stand or be seised, or at any time hereafter shall happen to be seised of any honors, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments to the use confidence or trust of any other person or persons or of any body politic by reason of any bargain, sale, feoffment, recovery, covenant, contract, agreement, will or otherwise by any manner of means whatsoever it be, that, in every such case, all and every such person and persons and bodies politic that have or hereafter shall have any such use confidence or trust in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seised deemed and adjudged in lawful seisin estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents constructions and purposes in the law, of and in such like estates, as they had or shall have in use trust or confidence of or in the same : And that the estate right title and possession that was in such person or persons that were or shall be hereafter seised of any lands tenements or hereditaments to the use confidence or trust of any such person or persons or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use confidence or trust after such quality manner form and condition as they had before in or to the use confidence or trust that was in them."

Sect. 2 enacts to the same effect in the case where divers and many persons shall be jointly seised to the use, confidence or trust of any of them that be so jointly seised (a).

(a) It was the common practice to make the *cestui que use* himself one of the joint feoffees to uses, and to place his name first among them.

See *Brent's Case*, 2 Leon. 15 ; Madox Form. Angl. *ante*, p. 100, n. (a). The above section of the statute expressly provides for such cases.

SECTION II. USES SINCE THE STATUTE OF USES.

Creation of uses within the statute—with transmutation of possession—declaration of use—uses raised by payment of consideration—resulting uses.

Creation of uses without transmutation of possession—bargain and sale—covenant to stand seised.

Limitation of uses—express limitations—resulting uses—limitation of uses upon bargain and sale—uses in remainder—springing and shifting uses—powers of revocation and new appointment—uses limited to the grantor—or to his heirs.

As the statute did not prohibit or prevent the creation of uses in the future, but operated by executing them, that is, converting them into legal estates, the creation of uses became the means, by force of the statute, of creating and conveying legal estates; and it thenceforth became necessary for the courts of common law to take cognizance of such modes of conveyance, and of the doctrines of uses upon which they depended. These doctrines, which for the most part are still applicable, may be shortly stated as follows.

Creation of uses within the Statute of Uses.

Uses may be raised under two conditions, involving different considerations;—with transmutation of possession, where uses are created upon an actual transfer of the seisin or legal possession;—without transmutation of possession, where new uses are created upon the existing seisin (*a*).

With transmutation of possession:—Upon a conveyance—With transmutation of possession—by declaration of uses.

(*a*) “Uses are raised either by transmutation of the estate, as by fine, feoffment, common recovery, etc., or out of the estate of the owner of the land, by bargain and sale, indented and inrolled, or by covenant upon lawful consideration,” etc. Co. Lit. 271 *b*; Butler’s note, ib. iii. (3); as to these two ways to

raise a use, see Plowden, 301. Accordingly, “after the statute legal conveyances were divided into those which took effect by way of transmutation of possession, and those which owed their operation exclusively to the doctrine of uses.” 1 Hayes Conv. 76, 5th ed.

ance operating upon the possession at law a mere declaration or expression of intention is sufficient to create and direct the uses of the conveyance. It is not essential that the word "use" be employed; any words expressing the intention of treating and limiting the beneficial interest in the land separately from the legal possession, and that the legal possession should be held for that intent and purpose, would be sufficient to create a use, which would be executed by the statute accordingly (a). —Thus, upon a feoffment or conveyance of land to A. and his heirs, to the *use* of B. and his heirs, or upon *trust* or *confidence* for B. and his heirs, or *to permit* B. and his heirs *to take the profits*, or in any terms to the like effect, the use is in B., and the statute vests the legal estate in him according to the use (b).

Declaration of
use must be
proved by
writing.

The declaration of the uses might have been made without writing until the passing of the Statute of Frauds, 29 Car. II. c. 3, s. 7, enacting "that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing or else they shall be utterly void and of none effect." This enactment applies to uses; but the following section (8) excepts those "which may arise or result by implication or construction of law." These are next to be considered (c).

Use raised by
payment of con-
sideration.

In the absence of express declaration as to the use the statement of a consideration paid serves as an implied declaration of the use to the feoffee or grantee; and for the purpose of marking the intention, the amount of the consideration is immaterial; a merely nominal consideration would suffice. But the presence or absence of a

(a) 1 Sanders on Uses, 61, 98.

Biggs, 2 Taunt. 109.

(b) 1 Sand. Uses, 97, 98; *Right*
v. *Smith*, 12 East. 455; *Doe* v.

(c) Gilbert on Uses, 270, 271; 1
Sand. Uses, 210.

consideration has no effect to vary an express declaration of the use (a).

Upon a feoffment or conveyance in fee, if there be no declaration of use, nor any consideration expressed to be paid, the use remains in the grantor, and is commonly called a *resulting use*. The statute executes the use and the grantor continues seised as before (b). This presumption against the use passing was founded on the general prevalence of the early practice of secret uses; it was presumed not to pass unless expressly declared so to do, or paid for with a consideration, and the proof of consideration was put upon the purchaser (c).

Upon the same principle, if upon a feoffment or conveyance in fee the use be declared for a particular estate only, and no consideration appear to carry the residue, so much of the use as is undisposed of by the declaration remains in the grantor as a resulting use (d). Thus, if the use be declared to the grantee or another for life, or in tail, or for years only, the reversion of the use being undisposed of results to the grantor. And a consideration paid in such case will be presumptively attributed to the estate limited, and will afford no inference as to the use undisposed of (e).

But if the use be declared to the grantor for an estate for life or years, the reversion, though not expressly disposed of, does not result to him but vests in the grantee; for by the opposite construction the particular estate would merge in the reversion and the grantor would resume the entire fee, against the express terms of the declaration of uses, which restricts his interest to the particular estate.

(a) 1 Co. 24 a, *Porter's Case*; 1 Sand. Uses, 61, 62, 104; "the payment of 5s. or the like serves as an implied declaration of the use to the feoffee, when it is not otherwise expressly disposed of." *Ib.* 104; see Gilbert on Uses, 45.

(b) 1 Sanders on Uses, p. 61, 62, 99; Perkins, s. 533; 2 Co. 58 a,

Beckwith's Case; *Armstrong v. Wholesey*, 2 Wils. 19.

(c) *Ante*, p. 99; see Bacon on Uses, p. 22; Gilbert on Uses, 45; 1 Spence Eq. Jur. 451.

(d) Co. Lit. 23 a, 271 b; Sanders Uses, 61, 103.

(e) 1 Sand. Uses, 104; Co. Lit. 22 b, 271 b.

If, however, the use be declared to the grantor for an estate tail, he may also take the reversion by resulting use; for an estate tail and the reversion in fee may subsist together in the same person (a).

Consideration of
tenure prevents
resulting use.

If the feoffment or conveyance of the legal possession be made for a particular estate only, as a gift in tail, or a lease for life or for years, the tenure alone thereby created, with its attendant services and obligations, supplied a consideration sufficient to prevent the use from resulting, and to carry it to the donee or lessee; and this doctrine applies at the present day. But an express use declared in favour of another would rebut the use implied from the tenure in such cases (b). The statute *Quia emptores* prevented the creation of any tenure which might carry the use upon a conveyance of the fee simple (c).

Uses raised with-
out transmuta-
tion of posses-
sion.
By bargain and
sale.

Uses may also be raised upon the existing seisin without a conveyance or transmutation of the legal possession:—Upon principles of equity any agreement, supported by a valuable consideration, to the effect that an estate or interest in land should be conveyed, as it might be specifically enforced in the Court of Chancery, was held to entitle the purchaser to the use or beneficial ownership according to the terms and intent of the agreement, without any legal conveyance; and accordingly the vendor was held to be or stand seised to the use of the purchaser. Such transaction, as creating a

(a) Bacon on Uses, Rowe's ed. notes, p. 223; 1 Sanders on Uses, 103; see *Adams v. Savage*, 2 Salk. 679; L. Raym. 854. "Generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together: in such case by the operation of the statute *de donis*, the estate tail is kept alive, not

merged by the reversion in fee." *Per* Kenyon, C. J., 5 T. R. 110, in *Roe v. Baldwere*.

(b) Perkins, ss. 534–537; 2 Leon. 16, *Brent's Case*; Dyer, 312 a. The relation of landlord and tenant is a consideration in law, hence in a contract for a lease no other consideration is necessary. *King's Leaseholds*, L. R. 16 Eq. 521.

(c) Perkins, s. 528, 529; see *ante*, p. 100 n. (a).

use executed by the statute, became technically known as a *bargain and sale*.

As a bargain and sale would thus have been effectual to convey a legal estate under the statute by mere force of the agreement without any writing or formality, it was thought expedient to add some formal conditions to the operation of the statute upon it; and it was enacted by a statute of the same session of parliament, 27 H. VIII. c. 16, to the effect that no estate of *freehold* shall pass by reason only of a bargain and sale, unless made by *writing indented, sealed and enrolled* in manner and place therein provided. This statute applied only to estates of freehold, and a use for a term of years might still be created within the statute of uses by mere bargain and sale without deed or enrolment (a).

Formalities required by statute of enrolments.

An agreement unsupported by a valid consideration, or a mere declaration of use without transfer of possession, was altogether void of effect in raising a use within the statute by reason of the principle that equity will not enforce gratuitous or, as they are called, voluntary agreements. And, in general, no distinction was admitted in equity in this respect by reason of the agreement or declaration being made in the form of a covenant or by deed under seal; although in law such formality supplied the force of a consideration (b). But the value or amount of the consideration paid was immaterial; the existence or expression of it was sufficient to denote that the transaction was intended by way of bargain and not as a mere voluntary agreement; and if not a voluntary agreement, it was effectual to raise a use by way of bargain and sale (c).

Consideration necessary.

Value of consideration immaterial.

An exception to the general rule of equity not to

Covenant to stand seised.

(a) *Fox's Case*, 8 Co. 93 b; but a mere termor, not being *seised*, could not create or transfer uses under the Statute of Uses, see *post*, p. 118.

(b) Bacon Uses, 13; Tracts, 310; see *Ellison v. Ellison*, 1 W. & T. L. C. 223.

(c) See *ante*, p. 106; 2 Sanders on Uses, 47. Thus, the rent of a peppercorn was held sufficient consideration to support a bargain and sale for a year. *Barker v. Keat*, 2 Mod. 249; and see 1 Co. 24 a, 26 a; 10 Co. 34 a.

Good consideration.

enforce voluntary agreements was made in the case of a covenant or declaration by deed executed by the person seised to stand seised to the use of his wife, child, or some blood relation. The *motive* then stood in place of a consideration, and it was said to be made upon a *good* consideration, as distinguished from a consideration of money or value, which formed the characteristic of a bargain and sale. A *Covenant to stand seised to uses* was thus a recognised mode of raising uses in family settlements (*a*).

Accordingly, a covenant to stand seised to the use of the brother of the covenantor raised a use in him; so a covenant to stand seised to the use of the heirs male of the body, or the heirs male special of the body of the covenantor effectually raised a use in such heirs male (*b*). But an illegitimate child is not within the consideration of blood to raise a use (*c*).

A covenant to stand seised to the use of a son or relative, if expressed to be made for a valuable consideration, is a bargain and sale, and requires enrolment under the statute; because the consideration expressed excludes the implied motive or consideration of relationship (*d*). The same deed may operate both as a covenant to stand seised and as a bargain and sale in favour of different parties, "as if A. covenants that in consideration that B. is his son, he shall have for life, and after his death in

(*a*) 2 Sanders on Uses, 80; *Sharrington v. Strotton*, Plowd. 298; *Bedell's Case*, 7 Co. 39 *a*. It is remarkable that, though called a covenant and indeed generally expressed in that form, there is no covenant in the sense of a contract for breach of which an action would lie, because there is nothing promissory in the matter of such deed. It simply purports to create a use, which whether well created or not is a question of law and not of act or default of the so-called covenantor. "No action of covenant shall be maintainable upon the deed, nor any

other advantage made of it, if it does not raise the uses." Plowden, 308. Hence, the form of a covenant is not essential for the purpose, and a deed purporting to be a conveyance but void as such may operate as a covenant to stand seised. 2 Sanders on Uses, 80.

(*b*) *Sharrington v. Strotton*, Plowd. 298.

(*c*) Co. Lit. 123 *a*; Hargrave's note (8). Ib.

(*d*) 7 Co. 39 *b*, *Bedell's Case*; 8 Co. 94 *a*; *Clarkson v. Hanway*, 2 P. Wms. 204; see *Filmer v. Gott*, 7 Bro. P. C. 70.

consideration that C. hath given him £100 that he shall have in fee" (a). A *good* consideration would not supply the want of a *valuable* consideration for the purpose of raising a use by an agreement or declaration not under seal (b).

These modes of conveyance, operating without transmutation of possession were formerly employed for the purpose of avoiding the formalities necessary for transmutation of possession at common law, such as livery of seisin, entry, attornment and the like; but a deed of grant being now in all cases sufficient without other formality to transfer the legal possession, upon which uses may be declared, the conveyances by bargain and sale and covenant to stand seised are no longer required or used. Some knowledge of them, however, is still necessary for the investigation of past titles; and it also occasionally happens that a deed of grant, which is defective as intended to operate, may be supported, upon a good consideration, as a covenant to stand seised; it could not be supported, upon a valuable consideration, as a bargain and sale without enrolment (c).

In an express declaration of uses within the statute the same estates may be limited, and the same terms are used and receive the same construction as in limiting estates at common law; thus the use may be limited in fee, in tail, for life or for years. The technical limitation "to the heirs" is necessary to convey an estate of inheritance in the use, as in the freehold at common law; and a declaration of use to a person, without words of limitation, is construed in a deed to give only an estate for life (d).

Limitations of uses.

Express limitations follow the construction of law.

(a) 1 Co. 154 b.

(b) Bacon on Uses, 44, as corrected in Rowe's excellent edition; the passage as printed in Bacon's Tracts, 336, is unintelligible; Gilbert on Uses, 271.

(c) See *ante*, p. 51, 54; 2 Wms. Saund. 96 b (1); *Roe v. Tranmer*,

2 Wils. 75; *Doe v. Williams*, 5 B. & Ad. 783; *Doe v. Prince*, 20 L. J. C. P. 223.

(d) 1 Sanders on Uses, 122, 123; *ante*, p. 33, 34. In order to insure uniformity of construction, where equity followed the law, the practice was adopted of calling in the judges

Resulting uses
how construed.

Resulting uses, arising in the absence of express declaration, follow the original estate of the grantor, according to the presumed intention, being the uses remaining in him, subject to those expressly limited (a).

Limitation of
uses upon bar-
gain and sale.

A bargain and sale before the statute raised a use in the purchaser without express declaration and without any words of limitation, by force of the agreement that he should take the estate of the vendor. But after the statute, when a bargain and sale became a recognised form of legal conveyance, it was held that the estate intended to be conveyed must be limited in the same technical terms as in conveyances at common law; and a bargain and sale of lands, not expressly limiting the use "to the heirs" of the bargainee, was construed to convey only an estate for life, according to the rule of common law (b).

Uses in remain-
der.

Uses may be limited by way of particular estate and remainders; and such limitations being executed by the statute become subject to the rules of law regulating remainders. Accordingly, upon a conveyance to the use of A. for a term of years, with remainder to the use of B. for an estate of freehold in contingency, the use in remainder is void for want of an estate of freehold to support it; though before the statute, when the freehold remained in the feoffees, the use was well created in equity, and took effect according to its terms (c).

Springing Uses.

The limitation of uses is not restricted by the doctrines of common law concerning the seisin; and, therefore, a use for a freehold estate may be limited to arise *in futuro* or upon a contingency without any prior limitation to support it as a remainder.—Thus a conveyance of the

to assist in Chancery or of sending a case to a court of law to certify according to the rules of law; see 1 Spence, Eq. Jur. 446; and see *post*, p. 139.

(a) *Ante*, p. 107; 1 Sanders Uses, 62, 101; *Beckwith's Case*, 2 Co. 58 a.

(b) 1 Co. 87 b; 1 Co. 100 b; 1 Sanders Uses, 122.

(c) *Ante*, p. 50; Fearn, C. R. 284; 1 Co. 135 a, *Chudleigh's Case*; *Adams v. Savage*, 2 Salk. 679; *Hopkins v. Hopkins*, 1 Atk. 581. Sugden's note to Gilbert on Uses, p. 164.

immediate legal possession may be made to the use of a person and his heirs, after four years, or after the death of the grantor, or to such uses as the grantor shall appoint by will (a). So, a bargain and sale might be made to the use of another after four years ;—so, a covenant to stand seised to the use of another after the covenantor's death (b).

In all such cases of uses to arise *in futuro*, the use being undisposed of except at the time or in the event specified, results or remains in the grantor or covenantor in fee simple as before, until the future use arises to displace it ; the use does not result or remain for a particular estate only, so as to convert such limitations into remainders (c).

A future estate in the use may also be limited to take effect in substitution or defeasance of a previously limited estate, and even of an estate in fee simple ; for the rules of common law, not admitting of any future limitations shifting the freehold except by way of remainder, nor of any limitations after an estate in fee simple, had no application to the use. A marriage settlement is a well-known instance of such limitations ; where the use is first limited to the settlor in fee, and, upon the marriage taking place, then to the uses of the settlement (d).

Future uses of the above kinds, including all such as are not limited by way of remainder, are called *springing* or *shifting uses*, the former term more especially denoting those that arise or spring up without any prior limitation ; the latter denoting those that shift the use in substitution of a prior estate (e). Being executed by the statute, they made a great advance upon the common law in the limitation of future estates.

(a) 1 Sanders on Uses, 136 ; Gilbert on Uses, by Sugden, 153, 161 ; *Cleré's Case*, 6 Co. 18 a ; *Davies v. Speed*, 2 Salk. 675, per Holt, C. J.

(b) *Roe v. Tranmer*, 2 Wils. 75 ; *Doe v. Prince*, 20 L. J. C. P. 223.

(c) Bacon on Uses, Rowe's ed. note (137) ; Gilbert on Uses, by

Sugden, 161, 162 ; 1 Hayes Conv. 464, App. ii. 2, on Resulting Uses ; and see *post*, Part II. Chap. II. 'Future Uses.'

(d) 1 Sanders Uses, 143 ; Gilbert on Uses, by Sugden, 153.

(e) Sugden's note to Gilbert on Uses, 152.

Powers of revocation and new appointment.

Springing or shifting uses may be thus limited to arise upon an event or in a manner fully specified in the deed declaring the uses ; or they may be limited to arise according to the appointment or direction of some person named in the deed for that purpose ;—whose authority is therefore described as a *power of appointment*, or (as the uses appointed thereunder necessarily revoke and defeat those previously subsisting,) a *power of revocation and new appointment*. The power of revocation is sometimes, though unnecessarily, added in express terms. The uses appointed in exercise of the power take effect as if originally declared in the deed (*a*).

Powers of appointment created by bargain and sale or by covenant to stand seised are required to be restricted to persons within the consideration ; because in those modes of conveyance, operating without transmutation of possession, the uses must be supported by a valid consideration (*b*).

Uses limited to the grantor.

It was impossible at common law for a person to make a direct conveyance to himself with the effect of changing the title into one by purchase ; nor could a person make his own heirs to take by purchase ; all such limitations being void and inoperative. But indirectly, by conveying the legal estate to another and declaring uses in his own favour, a person might acquire a new estate to himself, as a purchaser, by force of the Statute of Uses. Thus, if a person convey to another to the use of himself for life, or for years or in tail, he takes a new estate by the statute measured by those limitations. So, by a conveyance to the use of another for life, with remainder to the use of himself and the heirs of his body, the statute executes an estate tail in him as a purchaser (*c*).

But upon a conveyance by a tenant in fee simple to

(*a*) Co. Lit. 237 *a* ; Gilbert Uses, by Sugden, 153, 158 ; 1 Sanders on Uses, 154.

(*b*) *Ante*, p. 109 ; Sugd. Gilbert Uses, 91, 163, 398, 420 ; 2 Hayes

Conv. 51 n. (43), 81 n. (64) ; *Mildmay's Case*, 1 Co. 175 *a*.

(*c*) *Ante*, pp 51, 52 ; Co. Lit. 22 *b* ; 1 Sanders Uses, 131 ; Gilbert on Uses, by Sugden, 150.

the use of himself and his heirs or upon a resulting use to himself and his heirs, he was still held to be in of the ancient use and not by purchase (a). So, the limitation of a remainder to the use of the heirs of the grantor had the same effect as at common law in leaving the reversion in the grantor, and the heir took nothing by way of purchase (b). Now by the statute 3 & 4 Will. IV. c. 106, as before stated, under limitations to the person or to the heirs of the person who shall have conveyed the land, such person is to be considered as entitled by purchase and not as of his former estate (c).

Uses limited to the grantor and his heirs,

to the heirs of the grantor.

SECTION III. OPERATION OF THE STATUTE OF USES.

Operation of the statute in executing the use—nature of the possession transferred.

Mode of operation upon future and contingent uses—doctrine of *scintilla juris*—Lord St. Leonards' Act.

Seisin required to support uses—seisin not co-extensive with the uses—seisin for life—seisin in tail.

Limits of operation of the statute—uses declared upon possession for term of years—uses limited to the grantee of the legal possession—uses limited upon a use.

Special or active trusts—passive trusts or uses.

Application of the statute of uses to wills.

The statute does not apply to copyholds.

The statute executes the use, that is to say, invests it with the seisin or legal title, and subjects it to all the incidents of a legal estate. The grantee to uses is divested of all estate and interest in the land, and the *cestui que*

Operation of the statute in executing the use.

(a) Co. Lit. 12 b, 13 a; Hargrave's note (2) to Co. Lit. 12 b; 1 Co. 100 b; see *Roe v. Baldwere*, 5 T. R. 104.

(b) Co. Lit. 22 b; *Fenwick v. Mitford*, 1 Leon. 182; 1 Sanders Uses, 133; Fearné, C. R. 51, where see the distinction pointed out between a limitation to the use of the

heirs special and to the use of the heirs general, of the grantor. The same rule applied to the limitation of the uses upon a surrender of copyholds. *Roe v. Griffiths*, 4 Burr. 1952, 1960; see Fearné, C. R. 66.

(c) See *ante*, p. 52; as to the effect of such limitations in breaking the line of descent, see *ante*, p. 62.

use becomes seised or possessed in law of the same estate and interest which is limited to him in the use (a).

Nature of possession transferred.

The possession transferred by the statute is equivalent, for most purposes, to that acquired by livery of seisin, or, in case of leaseholds, by entry (b).

Mode of executing future and contingent uses.

The mode of operation of the statute with future uses, when limited by way of contingent remainders or as springing or shifting uses, formerly caused much perplexity and difference of opinion. The statute seemed to exhaust the seisin in serving the prior vested uses, so as to leave none to serve such future uses as and when they should arise. To meet this difficulty it was conceived that there remained in the grantees to uses a possibility of seisin, becoming an actual seisin when the executory uses required it. This was the celebrated doctrine of the *scintilla juris*, as this possibility of seisin was called. The only practical bearing of this doctrine lay in the suggestion that the *scintilla juris* might be dealt with in a manner to risk the safety of the dependent uses.

Doctrine of *Scintilla juris*.

After much abstruse speculation concerning the nature of the statutory process the result generally accepted seems to have been that it immediately converted uses of all admissible kinds into legal limitations in a manner quite beyond the power or control of the grantees to uses, and that the latter were merely formal instruments for carrying the legal title to the uses (c).

(a) Co. Lit. 22 b; see Bacon Uses, 45, Tracts, 337, describing the *modus operandi* of the statute; 1 Sand. Uses, 119.

(b) See *Hadfield's Case*, L. R. 8 C. P. 306; 42 L. J. C. P. 146, and the authorities there cited. In that case it was held to give the "actual possession" required for qualification of a voter under the Reform Act, 2 Will. IV. c. 45, s. 26. It seems that it does not, without entry, give the possession required to maintain

an action of trespass. *Geary v. Bearcroft*, Carter, 57, 66; but see *Anon. Cro. Eliz.* 46; and see *Hadfield's Case*, supra.

(c) Bacon Uses, 47, Tracts, 339; *Chudleigh's Case*, 1 Co. 120 a; Fearn, C. R. 300; 1 Sanders Uses, 110, 232; Gilbert's Uses, by Sugden, 296 n. (10); Sugden on Powers, Ch. I. sect. iii. 7th ed. where see the doctrine of *scintilla juris* fully discussed and all the cases collected. See Ib. 8th ed. p. 20.

All question as to the operation of the statute has been removed by the recent enactment of 23 & 24 Vict. c. 38, (Lord St. Leonard's Act to amend the law of property), s. 7, "Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses; nor shall any such seisin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere."

Lord St.
 Leonard's Act
 that all Uses take
 effect out of
 original seisin.

There must be a seisin to support uses to be executed by the statute. A conveyance purporting to transfer the freehold at a future date is void at common law, and will not support a declaration of uses; which, therefore, in such case, unless it can be supported upon the seisin of the grantor, without transmutation of possession, fails altogether. Thus, a grant to A. and his heirs after the death of the grantor is void, as purporting to transfer the seisin at a future time; but a grant to A. and his heirs, to the use of B. after the death of the grantor, is good, the transfer of seisin being present and the use only future; and the use is executed by the statute (a).

Seisin required
 to support uses.

The grant of a vested remainder or reversion conveys the seisin corresponding to such estates, and uses may be declared upon the seisin so transferred in remainder or reversion, and will be executed by the statute (b).

(a) *Roe v. Tranmer*, 2 Wils. 75; *Lamb v. Archer*, 1 Salk. 225; *Goodtitle v. Gibbs*, 5 B. & C. 709; *Doe v. Prince*, 20 L. J. C. P. 223; Sugden's

note to Gilbert on Uses, 163.

(b) *Ante*, p. 53; 1 Sanders Uses, 108; see *Haggerston v. Hanbury*, 5 B. & C. 101.

Seisin not co-extensive with the uses.

Seisin for life.

Seisin in tail.

The case of the seisin not being co-extensive with the uses declared upon it is not expressly provided for in the statute. According to Bacon, "the matter and substance of the estate of *cestui que use* is the estate of the feoffee, and more he cannot have; so as if the use were limited to *cestui que use* and his heirs, and the estate out of which it was limited was but an estate for life, *cestui que use* can have no inheritance." His estate must determine with the life of the feoffee to uses (a).

So also, according to Bacon, "If I give land in tail by deed since the statute to A. to the use of B. and his heirs; B. hath a fee simple determinable upon the death of A. without issue." But the later opinion seems to be that the statute does not apply to a seisin in tail. The difficulty arises from the seisin being appropriated to the heirs in tail by the statute *de donis*, and the tenant in tail consequently having no power over it, to execute the use, except by means of a recovery or disentailing assurance (b). A tenant in tail might raise a use upon his seisin co-extensive with his own life, as by a bargain and sale, which would be executed by the statute for an estate determinable upon his death (c).

Limits of operation of the statute.

Uses declared upon possession of terms of years.

The operation of the statute upon uses is restricted partly by the express terms of the statute, and partly by the judicial construction put upon the terms. The term *seised*, used in describing the condition of its operation, means invested with the legal possession for an estate of freehold, excluding possession for a term of years or chattel interest. Therefore, a use declared or raised upon a term of years is not executed by the statute and remains cognizable in equity only (d). It should be ob-

(a) Bacon Uses, 47; 1 Sand. Uses, 89, 109; but see Sugden's Gilbert on Uses, 127, n. (2).

(b) Bacon Uses, 57, Rowe's ed. note (114); Gilbert Uses by Sugden, 19; Lewin on Trusts, Introd.

p. 6, n. (1); but see 1 Sanders Uses, 90, in accord with Bacon.

(c) *Seymour's Case*, 10 Co. 95 b.

(d) *Ante*, p. 49; Bacon Uses, 42; Tracts, 335; 1 Sanders Uses, 263.

served that a use for a term of years raised upon a seisin of freehold is within the statute and executed; as in the bargain and sale for a year formerly made as the foundation of the conveyance by lease and release (a).

The statute is also restricted in terms to the cases of a person or persons being seised to the use of *another* person. According to Bacon, "The statute ought to be expounded that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law." Thus, if a grant be made to A. and his heirs to the use of A. and his heirs, the use is not executed by the statute; but the express declaration of use rebuts any resulting or implied use in the grantor, and the grantee remains in for his own use and benefit at the common law (b).

So, if a grant be made to A. and his heirs to the use of A. for life or for years, with remainder to the use of B. and his heirs, A. is in of an estate for life or for years at the common law (by way of abridgment of estate in course of possession) and B. is in of the fee simple by the statute (c). But if a grant be made to A. and his heirs to the use of A. in tail, the use in tail is executed by the statute, being a new estate in favour of the issue, and no part of the legal estate conveyed by the grant; so also, if tenant in fee simple covenants to stand seised to the use of himself in tail (d).

The case of many persons being jointly seised to the

Uses limited to grantee of legal estate.

Uses limited to

(a) See *ante*, p. 56.

(b) Bacon Uses, 63, Tracts, 352; 1 Sanders Uses, 91, 156; 13 Co. 56, *Samme's Case*; *Doe v. Prestwidge*, 4 M. & S. 178; *Orme's Case*, L. R. 8 C. P. 281; 42 L. J. C. P. 38. In such case the limitation of the use may operate as an *habendum*, limiting the estate conveyed at common law. *Jenkins v. Young*, S. C. nom. *Young v. Dymock*, S. C. nom. *Meredith v. Jones*, Cro. Car. 230, 244, cited in

Orme's Case, *supra*; *Shep. Touch.* by Preston, 106. *Peacock v. Eastland*, L. R. 10 Eq. 17, holding that grantee to his own use can disclaim the estate, which the mere grantee of the seisin to uses executed by the statute, it seems, cannot.

(c) Bacon Uses, 63, Rowc's ed. note (136); but see *Burton Compend.* (160), (160 n.)

(d) Bacon Uses, 63; 13 Co. 56; 1 Sanders Uses, 95.

some of joint
grantees.

Uses limited to
grantor and
others.

Uses limited
upon a use.

use of any of them is expressly provided for in the statute, and the uses are executed accordingly (*a*). Also in the case of a grant to A. and his heirs to the use of A. and B. and their heirs, the use is executed by the statute in A. and B. jointly (*b*).

The operation of the statute was also limited by judicial construction. The courts of law decided that the statute did not execute a use limited upon a use; that is to say, upon a feoffment to A. and his heirs, to the use of B. and his heirs, to the use or in trust for C., the statute executed the use in B., and invested him with the legal possession; but the operation of the statute was thereby exhausted, and the use limited to C. remained unexecuted (*c*).

Upon a bargain
and sale.

So, upon a bargain and sale to A., expressed to be to the use of B., the use raised in A. by the force of the consideration is executed by the statute, and the further use to B. remains unexecuted (*d*). The bargain and sale might be made to A. for a particular estate with remainder to B., and the use in remainder executed by the statute, as the consideration might be paid on account of the remainder; but all the uses declared upon a bargain and sale must be within the consideration (*e*).

Use limited upon
use in grantee.

By the same rule, if the grant be to A. and his heirs to the use of A. and his heirs, (or to and to the use of A. and his heirs,) to the use of B. and his heirs, though A. is in by the common law and the use declared to him not executed by the statute, neither is the use declared to B. executed, because it is a use limited upon a use (*f*).

Use shifting pre-
vious use.

A shifting use is not a use upon a use in the above sense, because it takes effect in substitution for and instead of the use previously declared, and is then executed

(*a*) See sect. 2, *ante*, p. 104.

(*b*) *Samme's Case*, 13 Co. 54.

(*c*) 1 Sanders Uses, 263; see *Cooper v. Kynoch*, 41 L. J. C. 296; L. R. 7 Ch. 398.

(*d*) *Tyrrel's Case*, Dyer, 155 *a*;

see *Haggerston v. Hanbury*, 5 B. & C. 101.

(*e*) 2 Sanders Uses, 48, 52; see *ante*, pp. 109, 114.

(*f*) *Doe v. Passingham*, 6 B. & C. 305.

by the statute (a). And where the previous use is declared to the grantee himself so that it is not executed by the statute, and he remains in at common law, a shifting use in favour of another takes effect in substitution of the use limited to him, and is not a use limited upon a use, so as to be beyond the operation of the statute.—Thus, if a grant be made to A. and his heirs to the use of A. and his heirs, but in a certain event, as the marriage of A., to other uses, the latter uses are executed ; so if, as frequently occurs, a conveyance be taken to A. and his heirs, to such uses as he shall appoint, and until and subject to such appointment to him and his heirs, the power of appointing uses is valid and the uses appointed under it will be executed (b).

Thus, it has been observed, the statute has had no other effect, as regards the jurisdiction of equity over uses, than to add three words to the conveyance, for the purpose of declaring an intermediate use. Further uses may then be declared beyond the reach of the statute, and within the cognizance of equity only (c).

Operation of statute avoided by limiting intermediate use.

The trusts or confidences upon which a conveyance may be made are further distinguished into *special* and *general*;—sometimes distinguished as *active* and *passive*. Special or active trusts are created for such intents and purposes as require that the grantee should retain the legal estate in order to perform them ;—as a trust to receive the rents and profits and pay them over in a prescribed manner, to pay taxes and outgoings, to do repairs, and the like ;—a trust to execute an estate or settlement of the land, or to grant leases ;—a trust to raise money by sale

Special or active trusts.

(a) *Ante*, p. 113.

(b) It has been objected that as a grantee to his own express use takes at common law, and not under the statute, a shifting use limited upon his seisin is void by the rule of common law against shifting limitations (see *ante*, p. 46) ; but the objection

has been overruled and the law settled as in the text. See 1 Sanders Uses, 155 ; Sugden on Powers, 168, citing *Moreton v. Lees* ; Burton Comp. (154) ; 1 Hayes Conv. App. ii. p. 459, 5th ed.

(c) *Per* Hardwicke, L. C., 1 Atk. 591, in *Hopkins v. Hopkins*.

or mortgage. Trusts of this kind are not uses within the statute, and remain cognizable in equity only (*a*).

Passive trusts.

General or passive trusts are such as are simply and absolutely for the benefit of another person, importing, expressly or impliedly, that he may take the possession and profits and direct the disposal of the land, without any duties in the grantee requiring him to retain the legal estate. These are *uses* within the meaning of the statute (*b*).

Application of
the Statute of
Uses to wills.

The Statute of Uses, 27 Hen. VIII, was passed before the Statute of Wills, 32 Hen. VIII, when there could be no devise to uses and no question of the application of the statute to wills. The Statute of Wills, which gave the power of disposition by will, operated by giving effect to the intention of the testator as expressed in his will; the application of the statute of uses seems therefore to depend upon the intention of the testator according to the construction of the will.

The testator may express his intention in the technical terms which are used in deeds for the limitation of uses to be executed by the statute; and he will then be presumed to intend to transmit the legal estate according to the ordinary legal effect of such limitations. Devises in such form, though they derive their essential effect from the testamentary power under the Statute of Wills, yet are construed as operating under the Statute of Uses in accordance with the presumed intention. In this sense the Statute of Uses applies to wills, and uses declared by will are executed by the statute (*c*).

Accordingly, a devise to A. and his heirs, to the use of

(*a*) Bacon Uses, 8, Tracts, 305; 1 Sanders Uses, 243; *Shapland v. Smith*, 1 Bro. C. C. 75; *Silvester v. Wilson*, 2 T. R. 444.

(*b*) Co. Lit. 272 *b*; Bacon Uses, 8, 9, Tracts, 305; 1 Sanders Uses, 243; *Doe d. Leicester v. Biggs*, 2 Taunt. 109; *Barker v. Greenwood*, 4 M. & W. 421; *White v. Parker*, 1 Bing. N. C. 573; 2 Jarman Wills,

198; *Best v. Donmall*, 40 L. J. C. 160. They are also called *simple* trusts. Lewin on Trusts, Introd. and ch. ii.

(*c*) *Ante*, p. 69; Butler's note to Co. Lit. 271, iii. 5; 1 Sanders on Uses, 241; 1 Sugden Powers, 171; 2 Jarman Wills, 196; *Doe v. Collier*, 11 East, 377; *Cooper v. Kynoch*, 41 L. J. C. 296, *per* James, L. J.

B. and his heirs, vests the fee simple in B.; and on the other hand, a devise to A. and his heirs to the use of A. and his heirs, or a devise to the use of A. and his heirs, in trust for or for the use of B. and his heirs, vests the legal inheritance in A. in trust for B., and does not carry it on to B.; and these results follow from the presumed intention of the testator in using limitations of established effect with reference to the operation of the statute (a).

Upon the same principle a devise to A. and his heirs upon any special or active trust requiring the possession of the fee vests the legal estate in A. and prevents its passing over to the ultimate beneficiaries, because such trusts are not executed by the statute, and it is the manifest intention of the testator that they should not be (b). Here the question whether and how far the devisee named as trustee takes the legal estate depends upon the nature of the trust imposed, and how far it requires the vesting of the legal estate in order to carry it out (c).

The Statute of Uses does not apply to the limitations of copyhold tenure, because there can be no *seisin* in the tenant, in the strict meaning of the word, but only a tenancy at will under the freehold title, the *seisin* or freehold remaining in the lord. Also because transmutation of possession by operation of the statute without an admittance would be prejudicial to the interests of the lord, and inconsistent with the form of the tenure (d). Copyhold tenure has a system of uses peculiar to itself, which answers, for the most part, the same purpose of relaxing the strictness and inconvenience of common law limitations (e).

(a) 2 Jarman on Wills, 196, and auth. there cited. See *Doe v. Field*, 2 B. & Ad. 564.

(b) 2 Jarman Wills, 198, 200; see *ante*, p. 121.

(c) *Ib.* see p. 213; Hawkins on

Wills, c. xiii.; see the Wills Act, 1 Vict. c. 26, ss. 30, 31; *post*, p. 167.

(d) *Ante*, pp. 72, 78; Co. Cop. s. 54; 2 Ves. sen. 257; Shepp. Touchstone, by Preston, 505, u. (7).

(e) See *ante*, p. 82.

Devise of freehold and copyhold combined upon trust.

Hence where freehold and copyhold lands combined were devised upon the same trusts, it was held that the Statute of Uses did not apply to the freehold, because it could not apply to the copyhold, and that the legal title of the freehold followed that of the copyhold in order to keep them combined according to the expressed intention of the testator (a).

(a) *Houston v. Hughes*, 6 B. & C. 403 ; *Baker v. Parson*, 42 L. J. C. 228.

CHAPTER IV.

THE LAW OF TRUSTS AND EQUITABLE ESTATES.

Section I. The Nature and Origin of Trusts.

II. The Creation of Trusts.

III. Equitable Estates, and Estate and Office of Trustee.

SECTION I. THE NATURE AND ORIGIN OF TRUSTS.

Uses not executed by the statute—trustee and *cestui que trust*.

Trusts in equity—equitable seisin and estate—legal estate held subservient to the equitable estate.

Trusts at law—possession of *cestui que trust*.

Legal and equitable title—union of legal and equitable title—the Supreme Court of Judicature Act.

Trusts of copyholds.

[The Statute of Uses was made with the object of converting uses into legal estates and so far as it operated was effectual; but the operation of the statute was restricted by the terms in which it was framed, and further by the judicial construction with which it was applied; also by the essential nature of the uses upon which it was intended to operate. It did not apply to uses declared upon terms of years; to uses declared upon a use; nor to special trusts and confidences requiring the grantee of the property to retain it for the active performance of his duties (*a*).]

Trusts distinguished from uses.

The uses, trusts and confidences unexecuted by the statute continued to be subject to the jurisdiction of the

(*a*) *Ante*, p. 118; also it did not apply to the uses or trusts declared upon the possession of a copyhold tenancy, *post*, p. 130.

Court of Chancery, and were administered upon the same general principles of equity as before the statute, though with a more extensive application. They became known as *trusts* in a special sense; the owner of the legal estate being distinguished as the *trustee* and the owner of the trust or beneficial interest as the *cestui que trust*. There is originally no essential difference of meaning in the words *use* and *trust*; the distinction is between those executed by the statute and those not executed, and in the different practice of the Court respecting them before and since the statute (a).

Trusts in equity. The *cestui que trust* is entitled in equity to the possession and enjoyment of the land, or to receive the profits or proceeds of it, and to dispose of the same according to the terms of the trust. The result is sometimes expressed by the phrase that in the Court of Chancery "the equity is the land"; and the *cestui que trust* is said, by analogy, to be *seised* or *possessed* of an equitable estate (b).

Equitable estate
and seisin.

(a) *Per* L. Mansfield in *Burgess v. Wheate*, 1 Eden, 217; and see *Doe v. Collier*, 11 East, 377.

(b) In the early days of trusts after the statute they were treated as a mere *chose in action* enforceable by *subpœna*, not assignable, and not carrying with them any of the rights and incidents of the seisin or legal estate. But about the period of the restoration, and particularly during the Chancellorship of Lord Nottingham, who has been styled the father of equity, the court proceeded to establish trusts upon a stricter conformity with legal estates. According to Lord Mansfield, "trusts were not on a true foundation till Lord Nottingham held the great seal; the *forum* where they are adjudged is the only difference between trusts and legal estates. Trusts are here considered, as between *cestui que trust* and trustee, and all claiming by, through, or

under them, or in consequence of their estates, as the ownership or legal estate.—Whatever would be the rule of law, if it was a legal estate, is applied in equity to a trust estate." *Per* Lord Mansfield in *Burgess v. Wheate*, 1 Eden, 223. "Now the trust in this court is the same as the land, and the trustee is considered merely as an instrument of conveyance." *Ib.* p. 226; and see *per* Thurlow, L. C., in *Shrapnell v. Vernon*, 2 Bro. C. C. 268, 272.

"It has been said by judges presiding in Chancery that 'the equity is the land' in that court; and so, indeed, while the trust continues to charge the person of the legal owner in respect of the land, it virtually is, in point of beneficial enjoyment. But the essential nature of an equity has not changed; it remains at this day, what it always was, neither *jus in re* nor *jus ad rem*, but a mere

The court of equity recognises the legal owner of the land and admits his title, but makes him wholly subservient to the equitable owner. It restrains him from exercising his legal rights for his own benefit, and compels him to hold, defend and dispose of the legal estate for the sole purpose of maintaining and realising the equitable estates and interests prescribed in the trust (a).

The legal estate made subservient to the equitable estate.

The *cestui que trust*, in general, may compel the trustee to put him in possession of the property to which he is beneficially entitled; but where the *cestui que trust* is not exclusively interested, and other parties have also claims, the court will exercise a discretion as to whether the possession shall remain with the trustee or be given to the *cestui que trust*, subject to such claims and with proper securities for them (b).

Right of *cestui que trust* to possession.

The jurisdiction of the courts of law, on the other hand, is confined to the legal ownership, at least in theory, and in regulating the rights of property takes no cognisance of any trust or equitable estate or interest.—In relation to the trustee or legal owner, the *cestui que trust*, if in possession, though in accordance with the trust, is in the position of a mere tenant at will (c);—and with regard to the legal title, as against strangers, the possession of the *cestui que trust* is the possession of the trustee (d).

Trusts at law.

Possession of *cestui que trust* at law.

There may thus be two different titles to the same land

Legal and equitable title.

right against the person, to be enforced by *subpoena*." 1 Hayes Conv. 98; and see Lewin on Trusts, Introduction.

(a) Lewin on Trusts, 437, 553, 554, 4th ed.

(b) Lewin, 437.

(c) Lewin, 439; see *ante*, p. 100; *post*, p. 208.

(d) *Parker v. Carter*, 4 Hare, 400. Notwithstanding doctrines advanced by Lord Mansfield in the last century, at the present day it

may be regarded as established:—first, that a *cestui que trust* cannot recover in ejectment in his own name, but must bring his action in the name of the trustee, who must be indemnified against the costs; secondly, that the trustee, as the tenant of the legal estate, may recover in ejectment from his own *cestui que trust*, who has no defence to the action at law, but must have recourse to an injunction in equity." Lewin, 440.

subsisting concurrently, the legal and the equitable title, regulated respectively by the different systems of law and equity, but the title at law being held in subservience to the equitable title. A title to land is not complete unless it is fully recognised under both systems; and a purchaser under a contract of sale is entitled, in general, to have conveyed to him a good title both at law and in equity (a). Accordingly, upon a purchase of land, the abstract of title to be delivered by the vendor must show the legal title in the vendor, or in some person who is trustee for the vendor, or whom he may compel to concur in the sale (b);—and in an action at law by a purchaser against a vendor for not making a good title, the question raised is not merely as to the title at law, but also whether it be such as a court of equity would compel the purchaser to accept (c).

Union of legal and equitable titles.

If the absolute equitable and legal titles unite in one person, the law alone is sufficient to maintain the rights of the owner, and equity does not, in general, interfere; in such case the equitable estate is said to merge in the legal and no longer exists; the beneficial use and enjoyment is referred wholly to the legal title (d).

Right of *cestui que trust* to the legal estate.

Where the legal estate is held simply upon trust for another absolutely, the *cestui que trust* may be entitled in equity to have the legal estate conveyed to him, so as to

(a) Sugden Vend. & Purch. 11th ed. 506; *Bryant v. Busk*, 4 Russ. 1.

(b) *Want v. Stallibrass*, L. R. 8 Ex. 175, 179; 42 L. J. Ex. 108.

(c) *Jeakes v. White*, 6 Ex. 873; *Simmons v. Heseltine*, 5 C. B. N. S. 554; 28 L. J. C. P. 129; *Clarke v. Willott*, L. R. 7 Ex. 313; 41 L. J. Ex. 197.

(d) *Selby v. Alston*, 3 Ves. 339; S. C. nom. *Goodright v. Wells*, Doug. 771. "Where the person is seised of the estate at law and of the same estate in equity, he cannot have a *subpaena* against himself. There is nothing upon which equity can act. The equitable estate is absorbed; the better phrase is, that

it no longer exists." *Brydges v. Brydges*, 3 Ves. 120, 127. "As a general rule, a plaintiff who has both a legal and an equitable title to land must proceed at law and not in equity." *Howard v. Earl Shrewsbury*, L. R. 17 Eq. 397, in which case an exception is stated in favour of an infant, who, under such circumstances, is entitled to proceed in equity against a person in adverse possession, as if he were guardian or bailiff, and to have a decree against him for an account of past rents and profits and for possession; and *Crowther v. Crowther*, 23 Beav. 305; 26 L. J. C. 702, to the contrary was disapproved of.

invest the equitable interest with the legal estate. But when, as generally is the case in the creation of trusts, many persons are interested concurrently or successively, and each *cestui que trust* has only a partial interest, it is then no part of his right to have the legal estate, but it is essential that the legal estate should remain in the trustee in order to support the various equitable estates and interests (a).

By "the Supreme Court of Judicature Act, 1873," 36 & 37 Vict. c. 66, (to come into operation 2 Nov., 1874,) s. 24, the Jurisdictions of Law and Equity will be combined in the same court and some important changes will be made in the remedies of a *cestui que trust*; but it does not appear that the fundamental distinctions of law and equity will be thereby directly affected, except as regards the procedure provided to administer them.

Supreme Court
of Judicature
Act.

By sect. 25, some specific amendments are made in the substantive rules of law and equity, by way of assimilating them (which will be noticed hereafter in treating of the several matters to which they relate); and the section concludes with the enactment that "generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail" (b).

The Statute of Uses, as already stated, does not apply to copyholds; and the uses of a surrender which

Trusts of
Copyholds.

(a) See 2 Spence, Eq. Jur. 2; a trust though simple and absolute as regards the beneficial interest, may be created for the purpose of protecting the *cestui que trust* from some personal disability or *status*, as infancy or coverture, which may require the trustee to retain the legal estate. *Ib.*; see *post*, Part V. 'Law of Persons.'

(b) No explanation is given of the intended scope and operation of this enactment, but it does not appear to

be intended to affect the fundamental distinction of the legal and equitable estate, or the relation of trustee and *cestui que trust*. As it will have to be construed judicially, upon those points in detail in which its aid may be invoked by the suitor, the anticipation of such points would here be purely speculative, and therefore beyond the purpose of this work, which is confined to the statement of the law as it can be ascertained to exist.

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serve to direct and limit the legal estate and possession under the peculiar forms and rules of customary tenure are not matter of equitable jurisdiction, nor are they within the scope of the statute of uses (a).

Trusts of copy-
holds.

But uses or trusts may be raised upon the legal possession to which admission is given according to the uses of the surrender, in like manner as upon the seisin of freehold tenure; and as the statute does not operate upon the possession of a customary tenant, such uses or trusts remain within the cognisance of equity only. Thus if a surrender be made to the use of A. to the use of or in trust for B., the legal estate is vested in A. by admittance, but he is trustee in equity for the use or trust declared in favour of B. who accordingly takes the equitable estate (b).

(a) *Ante*, p. 123.

(b) Scriven on Cop. Chap. xi.

Trust Estates, p. 400, 4th ed., and see *post*, p. 141.

SECTION II. THE CREATION OF TRUSTS.

Trusts raised upon conveyance of the legal estate.

By declaration of trust—precatory trusts—evidence in writing required by the Statute of Frauds.

By constructive trust—from payment of consideration—purchase in name of wife or child—voluntary conveyances—conveyances obtained by fraud.

By resulting trust—from partial declaration of trust—from declaration which fails of effect.

Trusts raised without conveyance of the legal estate.

By declaration of trust—voluntary declaration of trust.

By constructive trust arising from contract—voluntary agreements—imperfect gifts—voluntary declarations of trust distinguished.

{ The system of trusts is formed upon the same general principles of equity as that of uses before the statute ; but it has been much more largely developed, and in some points with different results. Like uses before the statute, trusts may be raised by express declaration, or by construction of equity ; and they may be raised upon two conditions of the legal estate,—upon a conveyance of the legal estate, vesting it in another for the purpose of or subject to the trust—or without any such conveyance, by severing the equitable interest from the legal estate as previously vested, leaving the legal owner in the position of trustee (a). Creation of trusts.

Upon a conveyance of the legal estate, a declaration of trust is sufficient to denote the intention of the conveyance, and to direct the course of the trust or equitable estate. If the legal conveyance is effectually made, the court of equity enforces the trust according to such direction (b). Trusts raised upon conveyance of the legal estate,—by declaration of trust.

(a) See 1 Hayes Conv. 102, 5th ed., where this distinction is contrasted with the corresponding distinction in the modes of raising uses. See *ante*, p. 105 ; and see Lewin,

ch. vi., on transmutation of possession.

(b) *Ellison v. Ellison*, 6 Ves. 656 ; 1 W. & T. L. C. 223 ; and authorities there cited.

Construction of
precatory words
and expressions.

No technical language is required to declare a trust; any words or expressions from which the intention can be ascertained are sufficient. In the construction of wills it is a general rule that even precatory words, as words expressing a wish, request, recommendation, hope, or confidence shall *prima facie* be taken to constitute a trust, if the trusts in other respects, as to the subject and object of the trust, be declared with sufficient certainty. If a declaration in such terms is meant to be discretionary only, and not imperative, it must be so expressed (*a*).

Evidence in
writing required
by the Statute of
Frauds.

The Statute of Frauds, 29 Car. II. c. 3, s. 7, requires that all declarations or creations of trust of lands tenements or hereditaments shall be manifested and proved by some writing signed by the party; with a saving of trusts arising or resulting by the implication or construction of law, as in the cases next mentioned (*b*). The statute applies to leaseholds and chattels real (*c*); but not to personal chattels, and as to these a declaration of trust may be made and proved without writing (*d*).

Writing subse-
quent to creation
of trust.

The statute does not require that a trust shall be created by writing, but that it shall be manifested and proved by writing; and therefore the written declaration or evidence may be subsequent to the creation of the trust (*e*). The trust or disposition of the equitable interest, whether declared or constructive, is determined at the time of the conveyance made, and, as then constituted, cannot be altered or affected by subsequent declaration, except under an express power of revocation reserved in the declaration of trust (*f*).

(*a*) 1 Jarman Wills, 334; Hawkins Wills, 159; *Knight v. Knight*, 3 Beav. 148; S. C. in H. L. nom.; *Knight v. Boughton*, 11 C. & F. 513; *Eaton v. Watts*, L. R. 4 Eq. 151; see *Mackreth v. Mackreth*, L. R. 14 Eq. 49; *Curnick v. Tucker*, L. R. 17 Eq. 320; see *post*, p. 136.

(*b*) See ss. 7, 8, cited *ante*, p. 106.

(*c*) *Skett v. Whitmore*, 2 Freem. 280.

(*d*) 1 Hare, 461, *M'Fadden v. Jenkyns*.

(*e*) *Forster v. Hale*, 3 Ves. 696; *Gardner v. Rowe*, 5 Russ. 258.

(*f*) See *Kilpin v. Kilpin*, 1 M. & K. 520, 531; *Stock v. M'Avoy*, L. R. 15 Eq. 55; 42 L. J. C. 230.

Courts of equity will allow the trust to be proved by other means than writing, notwithstanding the Statute of Frauds, where it becomes necessary in the exercise of their jurisdiction to prevent fraud; as where a person accepts a conveyance or devise upon a trust, which he afterwards fraudently refuses to execute, the trust may be established against him by parol evidence (a).

Trusts proved by parol evidence.

Where a conveyance is made without any declaration of trust, Equity, as a general rule, raises a trust in the purchaser or the person who advances the consideration or purchase money; and the rule is applied whether the conveyance is taken in the name of a stranger, or in the name of a stranger and that of the purchaser, either jointly or in successive limitations (b). The trust thus raised is within the saving clause (sect. 8) of the Statute of Frauds, as being a trust arising by construction of law, and may be proved by parol evidence (c).

Constructive trust raised by payment of consideration.

So with land of copyhold tenure, if a surrender or grant be made without any declaration of trust, but it appear that another person advanced the fine for admission upon the surrender, or the purchase money for the grant, the surrenderee or grantee will be presumed to hold upon a trust in his favour. Where admittance is given for several lives in succession, if one of the *cestui que vies* pay the whole price or purchase money, the trust results to him for the whole estate granted; and such trusts are the creation of equity and independent of the legal custom as to the distribution of the estate (d).

Trusts of copyhold raised by payment of fine or purchase money.

An exception to this rule occurs if the conveyance be taken in the name of the wife, or a child of the purchaser; a presumption then arises from the relationship that the

Purchase in name of wife or child.

(a) See *M'Cormick v. Grogan*, L. R. 4 H. L. 82, 97; *Haigh v. Kaye*, L. R. 7 Ch. 469; 41 L. J. C. 567; *Norris v. Frazer*, L. R. 15 Eq. 318; *Booth v. Turle*, L. R. 16 Eq. 182, and cases there cited.

(b) *Dyer v. Dyer*, 2 Cox, 92; 1

W. & T. L. C. 184, 192.

(c) *Lloyd v. Spillet*, 2 Atk. 148, 150.

(d) *Dyer v. Dyer*, 2 Cox, 92; 1 W. & T. L. C. 184; *Lewis v. Lane*, 2 M. & K. 449; Scriven, 408; see *ante*, p. 79.

purchase was intended for the benefit or advancement of the wife or child. But such presumption may be rebutted by contemporary evidence of a contrary intention (*a*). So, where the conveyance was taken in the names of the trustees of a previous marriage settlement containing trusts for the benefit of the purchaser's wife and children, it was held to be subject to the trusts of the settlement for their benefit (*b*).

Surrender of copyholds to use of wife or child of purchaser.

So, if the surrender and admittance of copyholds be taken in the name of the child or of the wife of the purchaser, it imports an advancement for their benefit, and rebuts the resulting trust in favour of the purchaser (*c*).

Voluntary conveyance.

Where a conveyance is made without any declaration of trust, and without any payment of purchase money whence to infer a trust or disposal of the beneficial interest, it is presumed to be made for the benefit of the legal grantee. The rule is different with uses, as has been seen, for absence of consideration and of declared intention raises a resulting use in the grantor. Thus, a grant to A. and his heirs, without any declaration of use and without any consideration to raise a use, imports a resulting use in the grantor, which is executed by the statute and the estate remains in him as before; but a grant to A. and his heirs to the use of B. and his heirs conveys the legal and equitable interest to B. although there be no consideration given or express appropriation of the beneficial interest, and there is no resulting trust (*d*).

Voluntary conveyance void against creditors and purchasers.

But conveyances made without consideration, or *voluntary* conveyances, as they are called, though good and effectual against the grantor and his representatives,

(*a*) *Dyer v. Dyer*, supra; *Grey v. Grey*, 2 Swanst. 594; *Crow v. Pettingill*, 38 L. J. C. 186; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Hepworth v. Hepworth*, L. R. 11 Eq. 10; *Stock v. M'Avoy*, L. R. 15 Eq. 55; 42 L. J. C. 230.

(*b*) *Re Curteis Trust*, L. R. 14 Eq. 217; 41 L. J. C. 631.

(*c*) *Dyer v. Dyer*, supra; Scriven on Cop. 411.

(*d*) *Ante*, p. 107; 1 Sanders on Uses, 334; see *per* Hardwicke, L. C., *Lloyd v. Spillet*, 2 Atk. 148.

are held to be fraudulent and void against creditors and subsequent purchasers, within the statutes 13 Eliz. c. 5, 27 Eliz. c. 4 (a).

It may here be noticed that a conveyance, whether voluntary or not, obtained by fraud or undue influence or mistake, may be set aside in equity, and a reconveyance decreed; and a trust may thus result in equity in favour of the grantor (b). So, a voluntary conveyance made for a special purpose which fails of effect (not being an unlawful or illegal purpose), may entitle the grantor to call for a reconveyance, and raise a resulting trust in his favour (c). But the trusts are raised in these cases by the general jurisdiction of equity to prevent fraud, which is not within the scope of this treatise further than to call attention to it as a copious source of constructive trusts, distinct from those arising in the ordinary *bonâ fide* dealings with property.

Conveyance obtained by fraud.

Voluntary conveyance for purpose which fails.

Where a conveyance is made to trustees, in that character, with a partial declaration of trust, or for the purpose of a trust which does not exhaust the beneficial interest, the interest undisposed of remains in the grantor as a resulting trust, like a resulting use before the statute. The presumption here is against the intention to pass the beneficial interest beyond the trust or purpose expressed (d).

Resulting trusts, —from partial declaration of trust.

So with a devise of land by will, if it be declared to be upon trust for a particular purpose, as for the payment of debts, and no further trust is declared, it is taken to be for that purpose only and no other, and the

Devise upon partial trust.

(a) *Post*, Part IV. 'Fraudulent Conveyances.'

(b) *Huguenin v. Baseley*, 2 W. & T. L. C. 504; *Hall v. Hall*, L. R. 8 Ch. 430; 42 L. J. C. 444, where see as to the presumption of fraud arising from a voluntary conveyance being made without a power of revocation.

(c) See *Manning v. Gill*, L. R. 13 Eq. 485; 41 L. J. C. 736; *Haigh v. Kaye*, L. R. 7 Ch. 469; 41 L. J. C. 567; *Colquhoun v. Courtenay*, 43 L. J. C. 338; see *ante*, p. 133.

(d) 1 Sanders on Uses, 327; *ante*, p. 107; 2 Atk. 150, *Lloyd v. Spillet*.

unexhausted beneficial interest results to the heir or passes to the residuary devisee; but if the land be devised merely subject to a particular charge, as a charge of debts, the unexhausted beneficial interest remains with the devisee. Difficulty often occurs in construing wills in this respect, because, from the universally voluntary nature of devises, absence of consideration affords no guide to the intention, as it does in a conveyance *inter vivos* (a).

Resulting trust from declaration which fails of effect.

Precatory declarations.

So, where the declaration of trust extends to the whole interest, but is void or incapable of taking effect or in the event fails of effect wholly or partially, there is a resulting trust for the grantor or his representatives (b). But if a conveyance, though voluntary, be accompanied with a declaration, which is construed as precatory only, and which therefore fails of legal effect only as not intended to amount to an obligatory trust, the beneficial interest rests in the grantee, and there is no resulting trust (c).

Trusts raised without conveyance of the legal estate,—by declaration of trust.

Voluntary declaration

[Trusts may be raised without a conveyance of the legal estate, by express declaration of trust;—a complete declaration of trust made by the owner of the legal estate is as efficient to raise the trust as if made upon a transfer of the legal estate; the trust is raised by force of the declaration, and does not require any consideration to support it by way of contract (d). “A declaration of trust is considered in a court of equity, as equivalent to a transfer of the legal interest in the court of law; and if the transaction by which the trust is created is complete, it will not be disturbed for want of con-

(a) 1 Jarman Wills, 502; see *King v. Denison*, 1 V. & B. 260.

(b) 1 Sanders on Uses, 331; *ante*, p. 135; and see the like doctrine applied to devises, 1 Jarman Wills, 502, 506; as to trusts failing from uncertainty of expression, see 1 Jarman, 333.

(c) *Harding v. Glyn*, 1 Atk. 469; see *Wood v. Cox*, 2 M. & Cr. 684; 1 Jarman Wills, 344; as the effect of precatory expressions in wills, see *ante*, p. 132.

(d) 1 *White v. Tudor*, L. C., 3rd ed., 238, notes to *Ellison v. Ellison*; Lewin on Trusts, c. vi. p. 55, 4th ed.

sideration" (a). But if voluntary, it may be void against purchasers or creditors upon the same principles as a conveyance of the legal estate (b).

Any contract or agreement concerning an interest in land, which a court of equity would decree to be specifically performed, creates a trust or equitable estate to the extent of the interest contracted for. Thus, under a valid contract of sale of land the vendor becomes a trustee for the purchaser for the performance of the contract according to its terms and conditions (c).

Trusts raised by contract.

A contract satisfying the statutory requirements of a bargain and sale, as being by deed indented and enrolled, might raise a use executed by the statute and at once convey a legal estate; "but," it has been remarked, "even if those requisites were observed a contract could rarely so operate, for, as it ordinarily contemplates a future conveyance, to be preceded by an investigation of the title, its executory nature would negative that operation, no less than it prevents the vendor standing in the simple relation of a bare trustee to his *cestui que trust*." "It raises a *qualified* trust in favour of the purchaser"—a trust for specific performance according to the terms of the contract (d).

Contract operating as bargain and sale.

[An agreement without consideration or voluntary agreement to transfer an estate or interest is not enforced in equity, and therefore raises no trust (e). Nor does it have any greater effect in raising a trust when made in form of a covenant under seal, or in favour of a wife or child or other relation (f); herein differing from

Voluntary agreement.

(a) *Per* Lord Langdale, M. R., *Collinson v. Patrick*, 2 Keen, 123.

(b) *Ante*, p. 134.

(c) See *Legard v. Hodges*, 1 Ves. jun. 477. *M'Creight v. Foster*, L. R. 5 Ch. 604; S. C. nom. *Shaw v. Foster*, L. R. 5 H. L. 321.

(d) 1 Hayes Conv. 96; 1 Sanders on Uses, 114; as to the trust arising upon a contract of sale see *Wall v.*

Bright, 1 Jac. & W. 494, 501; *Trotter v. Watson*, L. R. 4 C. P. 434, 450; *M'Creight v. Foster*, L. R. 5 Ch. 604, 610; 5 H. L. 321.

(e) 1 W. & T. L. C. 255, notes to *Ellison v. Ellison*.

(f) *Ib.* 256; Lewin on Trusts, 62, 63, 4th ed.; *Jefferys v. Jefferys*, Cr. & Ph. 138; *Dillon v. Coppin*, 4 M. & Cr. 647.

a covenant to stand seised to uses, which raised a use upon a *good* consideration, *i. e.*, in favour of a wife or blood relation, without any valuable consideration to support it. An intended marriage is considered as a valuable consideration in support of an agreement, and for the purpose of raising a use or trust^(a).

Imperfect gift.

The same principles apply to a gift or voluntary conveyance, if imperfect; equity will not assist or enforce it, and therefore no trust is raised in favour of the donee (b).

Voluntary declaration of trust distinguished.

The distinction between a voluntary declaration of trust and a voluntary agreement to convey or an imperfect gift, the former being sufficient to raise a trust and the latter not, has been further explained as follows:—“A declaration of trust purports to be and is in form and substance a complete transaction, and the court need not look beyond the declaration of trust itself or inquire into its origin;—whereas an agreement or attempt to assign is in form and nature incomplete, and the origin of the transaction must be inquired into by the court; and where there is no consideration, the court, upon its general principles, cannot complete what it finds imperfect” (c). It may be added that by a declaration of trust the owner of the property intends to constitute himself a trustee; but in making an agreement or an attempt to convey he has no such inten-

(a) *Gilbert on Uses*, 47; *Fremoult v. Dedire*, 1 P. Wms. 429; *ante*, p. 110. The doctrines of equity with respect to voluntary agreements have been thus stated:—“If the intention was suffered to rest in contract, then a substantial consideration as money or money’s worth or the value of a prospective marriage, was requisite to evoke the extraordinary aid of equity—evoked in order, not merely to execute, but to establish the trusts. Between moral duty to a wife or child and bounty to a stranger equity no longer made any distinction, but regarded as

volunteers all whose claims had not the support of a really valuable consideration; and for a volunteer equity would not do more than administer a trust regularly constituted.” 1 *Hayes Conv.* 102.

(b) 1 W. & T. L. C. 243, notes to *Ellison v. Ellison*; *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. & Cr. 226.

(c) *Per Wigram, V. C., M’Fadden v. Jenkins*, 1 Hare, 462; and see 1 W. & T. L. C. 243, 256, in notes to *Ellison v. Ellison*. See *per Jessel, M. R. Richards v. Delbridge*, 43 L. J. C. 459.

tion, and if he becomes so, it is by construction of equity only (a).

SECTION III. § 1. EQUITABLE ESTATES, AND § 2. ESTATE AND OFFICE OF TRUSTEE.

§ 1. EQUITABLE ESTATES.

Equity follows the law—limitation of equitable estates—rules of tenure and doctrines peculiar to freehold.

Equitable estates of copyhold follow the custom—are not subject to fines and incidents of the legal tenancy—lord not bound by trusts—unless appearing on the rolls—custom to surrender upon trusts.

Equitable estates arising from constructive trusts.

Conveyance of equitable estates—writing required by the Statute of Frauds—equitable estates of copyhold.

Disposition by will and descent of equitable estates.

In the regulation of trusts, equity, in general, follows the law ; except where the different nature of the jurisdiction excludes any analogy (b). Equity follows the law.

Accordingly in the declaration of the trust or beneficial interest the limitations of the legal estate are followed. The same estates are allowed and the same language is generally used and receives the same construction as at law. Thus, the equitable estate may be limited in fee simple or in tail, for a term of life or for years, in possession and in remainder (c). The limitation of equitable estates.

It was formerly the practice for the court of chancery, in a case of doubtful construction of the limitations of an equitable estate, to send the case to a court of common law, with the question stated as if it had arisen Practice of stating cases for the opinion of Court of law.

(a) See *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. & Cr. 226; and see Lewin on Trusts, c. vi. p. 55, 56, 4th ed.

(b) *per* Lord Mansfield, in *Burgess v. Wheate*, 1 Eden, 223; cited *ante*, p. 126.

(c) Sanders on Uses, 269; 2 Ves. sen. 655, *Garth v. Baldwin*; *Wright v. Pearson*, 1 Eden, 119; *Burgess v. Wheate*, 1 Eden, 223, cited *ante*, p. 126; *ib.* p. 250, *per* L. Northington; Butler's note to Co. Lit. 290 b, s. xiv.

upon an instrument operating at law, for the opinion of the court of law as to the construction of the words of the instrument; and where the question could not be so moulded, the assistance of some of the judges might be called in. But even where a question as to the construction of an instrument operating at law arose in a suit in chancery, it was fully competent to the court to decide it upon its own authority (*a*). The Chancery Amendment Act, 15 c. 16 Vict. c. 86, s. 61, put an end to the practice of directing a case to be stated for the opinion of a court of law, giving the Court of Chancery full power to determine any questions of law necessary to be decided previously to the decision of the equitable question at issue.

The practice abolished.

Rules of tenure have no application to equitable estates.

Doctrines peculiar to freehold have no application.

But the rules of tenure have no application to the equitable estate; for the trustee is equally recognised to be the legal tenant, bound by the duties of tenure, in equity as at law. So, also, the legal doctrines concerning the seisin, requiring the tenancy to be always full, and excluding all future or shifting limitations except by way of remainder, as they are peculiar to the quality of freehold, have no application to the equitable estate; and an equitable estate may be limited to arise at a future time, or upon future or contingent events, or by appointment under a power, with all the freedom of springing and shifting uses, and in some respects even with greater freedom (*b*).

Equitable limitations of copyholds follow the custom.

Upon the same principle that equity follows the law, a declaration of trust of copyholds, as to the estates admissible, the limitation of estates, and construction of the limitations, follows and is regulated by the custom of the manor. Accordingly, the equitable interest cannot be limited for an estate tail in manors which have

(*a*) 1 Spence, Eq. Jur. 517; see *per* Bayley, J., *Houston v. Hughes*, 6 B. & C. 420; 11 Simons, 489, *Blundell v. Gladstone*; see *ante*,

p. 111; and see *per* Cranworth, L. C. 26 L. J. C. 444, in *Roddam v. Morley*.

(*b*) *Ante*, pp. 112, 113.

no special custom that the legal tenancy may be entailed (a).

But the equitable estate in copyholds is independent of the claims of the lord incident to the legal tenure ; as fines, fees, heriots, escheat, forfeiture and the like (b). Trust estate not subject to fines and other incidents of the legal tenancy.

If a surrender is made upon express trusts, the lord is not bound to notice the trusts or to enter them upon the court rolls ; nor is he bound by notice of any trusts which do not appear upon the rolls (c). If a surrender upon terms expressing or referring to trusts be accepted and enrolled, the lord may be bound by the trusts as against his own rights ; and in case of an escheat or forfeiture of the tenancy, he would then hold as trustee, and might be compelled to regrant according to the trusts (d) ; but he would not be liable, as for a breach of trust, in respect of any merely ministerial acts required of him as lord (e). It seems that there may be a custom in a manor to surrender lands upon trusts declared in the surrender (f). The lord's rights are not affected by trusts unless entered upon the rolls.

Equitable estates arising from constructive trusts without any express declaration follow the intention of the parties or are regulated by the circumstances of the case. Thus, a contract for the sale of land without expressing the interest intended is construed as referring to and importing the whole interest of the vendor, which he is therefore bound to convey ; and the contract may thus create an equitable estate in fee simple without any technical words of limitation (g). So, a resulting trust carries all the equitable estate undisposed of, without any words of limitation (h). Equitable estates arising by constructive trust.

(a) *Pullen v. Middleton*, 9 Mod. 483 ; *Scriven*, 68, 400.

(b) *R. v. Hendon*, 2 T. R. 484 ; 1 Strange, 454, *Peachy v. Duke of Somerset*.

(c) *Peachy v. Duke of Somerset*, supra.

(d) *Weaver v. Maule*, 2 Russ. &

M. 97.

(e) *Scriven on Cop.* 405.

(f) *Snook v. Southwood*, 5 A. & E. 239.

(g) See ante, p. 137 ; *Bower v. Cooper*, 2 Hare, 408.

(h) *Ante*, p. 135.

Conveyance of
equitable estates.

In the transfer of equitable estates and interests by conveyance *inter vivos*, it is the ordinary practice to use the same formal assurances as are required in law for the corresponding legal interests, as a deed of grant, or release, etc., which are taken in equity to have the same effect upon the equitable estate as they would have in law, if the estate were legal; but such formal assurances are not absolutely necessary. Any instrument which expresses an intention to transfer the beneficial ownership to another is effective in equity; with a few exceptional occasions, as in the case of a tenant in tail or a married woman, who are required to employ the same formalities as at law (a).

Writing required
by Statute of
Frauds.

By the Statute of Frauds, 29 Car. II. 2, c. 3, s. 9, "all grants or assignments of any trust or confidence shall be in writing signed by the party granting or assigning the same."

Equitable estate
in copyhold
passes without
surrender or
admittance.

Equitable estates and interests in copyholds may be created and assigned without surrender or admittance, or any of the forms appropriate to the legal tenancy, and without any other formality than is required for trusts in general (b). So, the equitable estate might have been devised without a surrender to the use of the will, before such surrenders were dispensed with by statute (c). But by the Fines and Recoveries Act, 3 & 4 Will. IV. c. 74, s. 50, a disposition of copyhold land by a tenant in tail, whose estate shall be merely an estate in equity, may be made either by surrender, or by a deed as therein provided (see sect. 50-53).

Equitable estate
tail barred by
surrender.

Devise of
equitable estate.

Equitable estates are devisable by will with the forms required for making a valid will (d). In case of in-

(a) See 1 Hayes Conv. 98, 127; 1 Sanders on Uses, 342; *Carpenter v. Carpenter*, 1 Vern. 440; *North v. Champenown*, 2 Ch. Ca. 78, per Nottingham, L. C.

(b) See *ante* p. 72.

(c) *Tuffnell v. Page*, 2 Atk. 37; see *ante*, p. 84.

(d) 1 Sanders, 271; 1 Vict. c. 26, s. 2; *post*, Part IV. 'Disposition by Will.'

testacy an equitable estate of inheritance descends to the heir according to the legal rules of descent, including the variations of special customs to which the land is subject; while an equitable estate for a term of years or chattel interest passes to the executor or administrator as personal estate (*a*). Descent of equitable estate.

§ 2. ESTATE AND OFFICE OF TRUSTEE.

Estate of trustee—trust follows the estate.

Purchaser for value without notice—purchaser without value—purchaser with notice.

Purchase under trust for sale—power of trustee to give receipts—statutory power.

Power to appoint new trustees—jurisdiction of Court of Chancery to supply the want of trustees—statutory power of Court to appoint new trustees—statutory power without the aid of the court.

Liability of trustee to account—remuneration for time and services—expenses—employment of agents—indemnity.

Liability for breach of trust or negligence—default of agent—default of co-trustee.

Profits of trust—purchase of trust property by trustee—purchase of incumbrance—renewal of lease by trustee—purchase from *cestui que trust*—persons in fiduciary position.

The land, remaining at law the property and at the disposal of the trustee, is subject, in his hands, to all the incidents of legal ownership. It passes by his conveyance or devise, or descends to his heir (*b*). Estate of trustee.

But the trust or equitable title is, for the most part, independent of the casualties affecting the legal ownership, and, as a general rule, follows and attaches upon the land through all the devolutions of the legal title. All persons who take through or under the trustee, as his grantee, (except a purchaser for value without notice of The trust follows the legal estate.

(*a*) 1 Sanders, 270; *ante*, p. 86. (*b*) Lewin on Trusts, 170, 4th ed.

of the trust,) devisee, heir, executor or administrator, are equally bound by the trust (a).

Also creditors of the trustee, obtaining execution against the property held in trust in exercise of their legal right, would be restrained in equity, or would themselves be declared to be trustees (b). So a trustee in bankruptcy has no claim against property held by the bankrupt upon trusts (c).

Purchaser for value without notice of the trust.

An exception occurs with a purchaser acquiring the legal estate from the trustee for a valuable consideration and without notice of the trust. The trust is thereby displaced and extinguished as to the land; for the purchaser, in such case, has an equal equity with the former equitable owner, and having the legal estate is allowed to retain it, according to the maxim, "*in aequali jure melior est conditio possidentis*." The former equitable owner is left to his claim against the trustee personally for the breach of trust in parting with the trust property (d).

Purchaser with notice from purchaser without notice.

The purchaser for value without notice can convey a good title, discharged of the trust, even to a purchaser with notice, except to the trustee who committed the breach of trust; in whose hands the land, though purchased for value, would be restored to the trust, in order to meet his original breach of trust (e).

Purchaser without value.

A purchaser, or person acquiring the trust property from a trustee, without giving any value or consideration for it, as by a voluntary gift or devise, is charged with the trust and all equities affecting the property to the same extent as the trustee from whom he took, whether he had notice of the trust or not (f).

(a) Lewin, 185.

(b) 1 Sanders on Uses, 351; Lewin, 186, 556.

(c) See *Kitchen v. Ibbetson*, L. R. 17 Eq. 46, 49.

(d) 1 Sanders, 320, 350; Lewin, 557; as to the remedy for the breach of trust see *ib.* 588. See *post*, Part

II. Chap. II. Sect. VI. The trustee may also be liable as for a misdemeanor for a fraudulent sale of the trust property, by the Fraudulent Trustees Punishment Act, 20 & 21 Vict. c. 54.

(e) *Ib.*

(f) 1 Sanders, 319; Lewin, 556;

A purchaser taking the trust property from a trustee with notice of the trust, though he paid full value for it, is subject to the trust; but if he paid value, it will be presumed that he had no notice, and the onus of proving notice will lie upon the party alleging it against him (a). Notice received before paying the purchase money is sufficient to charge a purchaser with the trust, though he had no notice at the time of contracting for the purchase (b).

Purchaser with notice.

Where the property is sold and conveyed by the trustee in execution of the trust, a purchaser with notice is so far bound by the trust, according to the general rule, that he becomes responsible for the sale being a proper one, and for the proper application of the purchase money; upon the principle that the *cestui que trust*, as being the equitable owner, alone can discharge him. But an exception is made with trusts for general purposes, which the purchaser has no means of inquiring into, as a trust to sell for the payment of debts generally, or for the payment of debts and legacies, or other kinds of trust which imply the power of selling the property discharged of the trust. Trusts for the payment of specified debts, or of legacies only, are within the general rule (c).

Purchase under trust of sale.

Implied power to give receipt for purchase money.

Hence trusts requiring a sale or disposal of the property, in order to facilitate the execution of the trust, are usually framed with an express power of giving receipts to the purchaser, and discharging him from the obligation of seeing to the proper application of the purchase

Express power to give receipt.

1 Co. 121 b; *Marlow v. Smith*, 2 P. Wms. 200; *Grant v. Mills*, 2 V. & B. 306.

(a) 1 Sanders, 319; Lewin, 557, the Statute of Limitations will run in his favour, which it will not in the case of an express trustee. Ib. 560; *post*, Part IV. Chap. VI. 'Statutes of Limitation.'

(b) *Wigg v. Wigg*, 1 Atk. 382; *Hardingham v. Nicholls*, 3 Atk. 304;

Tourville v. Nash, 3 P. Wms. 307.

(c) Lewin, 307, 309, 313; *Elliott v. Merriman*, 2 Atk. 4; S. C. 1 W. & T. L. C. 51, see notes, ib. p. 58, and see *post*, p. 275. A trust authorising a sale for the purpose of re-investing implies a power in the trustee to receive the purchase money and discharge the purchaser. *Locke v. Lomas*, 5 D. & S. 326; 21 L. J. C. 503.

money. The purchaser is then discharged from all responsibility upon payment of the money to the trustees, and obtaining their receipts; for the equitable owners claiming under the trust are bound by its terms and conditions. Such a clause, however, does not exempt the purchaser from the consequences of the power of sale not being duly exercised, upon a proper occasion and in a proper manner (a); and it may happen that notwithstanding such clause, the power is made conditional, as to its due execution, upon the proper application of the money (b).

Statutory power
to give receipts.

It is now provided generally by statute 23 & 24 Vict. c. 145, (Lord Cranworth's Act,) s. 29, that "the receipts in writing of any trustees or trustee for any money payable to them or him by reason or in exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof." This Act extends only to instruments executed after the passing of the Act (s. 34); and the instrument may negative or vary its operation (s. 32). Powers of sale expressly given to trustees by any instrument may be exercised according to the provisions of sections 1-10 of the same Act, unless those provisions are negated or varied by the instrument (c).

(a) *Rede v. Oakes*, 4 D. J. & S. 505; 34 L. J. C. 145; *Dance v. Goldingham*, 42 L. J. C. 777; L. R. 8 Ch. 902.

(b) *Doe v. Martin*, 4 T. R. 39; *Hougham v. Sandys*, 2 Sim. 95; see 2 Sugden Powers, 478. In mortgages, in order to facilitate the remedy, it is usual to provide further in express terms that a purchaser shall not be affected by the power of sale not being properly exercised as against the mortgagor, or by any irregularity in the sale; but such a

provision would not protect him against the consequences of actual notice of an improper or irregular sale. 1 Pridgeaux Conv. 434, 7th ed.; *Jenkins v. Jones*, 2 Giff. 99.

(c) As to the effect of these provisions see 1 Pridgeaux Conv. 461-465, 7th ed.; the receipt clause may now be safely dispensed with, 2 Pridgeaux, 180. See the previous Act of Lord St. Leonards, 22 & 23 Vict. c. 35, s. 23, enacting to the like effect, but extending only to trust moneys arising from sales and mortgages.

Power is usually given to trustees to convey the property to new trustees as occasion requires for the purpose of continuing the trust; such power being generally made exercisable with the consent of the *cestui que trust*. In the absence of such express power there is no general power in the trustees to transfer the property and delegate the trust (a). Power to appoint new trustees.

But the *cestui que trust* is entitled to have, at all times, proper trustees to hold the estate and support the trust, and the Court of Chancery has a general jurisdiction to execute trusts, and order conveyances of the trust property, which will be exercised as occasion requires. It being a maxim of equity that "a trust shall not fail for want of a trustee," the Court will supply the want of them when necessary (b). Jurisdiction of the Court of Chancery to supply the want of trustees

The appointment of new trustees upon occasions of difficulty has been facilitated by statute. By the Trustee Act, 1850, 13 & 14 Vict. c. 60, s. 32, it is enacted "that whenever it shall be expedient to appoint a new trustee, or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees, either in substitution for, or in addition to any existing trustee or trustees,"—and, by the act to extend the above Act, 15 & 16 Vict. c. 55, s. 9, "whether there be any existing trustee or not at the time of making such order." The Court may also make an order vesting the lands in the new trustees, which shall have the same effect as a conveyance made by the former trustees for the same purpose (c). Statutory power of the Court to appoint new trustees.

The Court will not, in general, exercise the power given by this enactment, where there is an existing power of

(a) Lewin, 192, 420, 434.

(b) *Ib*; Lewin, 535, 547; see *Bennet v. Davis*, 2 P. Wms. 316; *Brown v. Higgs*, 8 Ves. 570; *Davis Trusts*, L. R. 12 Eq. 214.

(c) 13 & 14 Vict. c. 60, s. 34; as to the application of these enactments, see Lewin on Trusts, 684; Chitty's Statutes.

appointing new trustees, which is capable of exercise (*a*).—The court may appoint a new trustee in place of a trustee residing abroad, without his consent (*b*); or in place of a bankrupt trustee (*c*).—The Court may enlarge the number of trustees originally appointed (*d*); and where a trustee wishes to retire, the Court may appoint the continuing trustees to be sole trustees (*e*).

The Court in appointing new trustees has regard to the wishes of the person who created the trust, as appearing in the instrument creating it, also to the interests of all the *cestui que trusts*, and to the proper execution of the trust (*f*). As a general rule, the Court will not appoint a tenant for life of the equitable estate, although such an appointment is perfectly valid (*g*).

Statutory power to appoint new trustees without the aid of the Court.

By the 23 & 24 Vict. c. 145, (Lord Cranworth's Act,) s. 27, a general statutory power of appointing new trustees and of transferring to them all the powers and property of the trust, without the aid of the Court, is given in the terms there contained. The Act applies only to instruments executed after the passing of the Act, and its application may be negatived or varied by the instrument creating the trust (ss. 32, 34).

Trustee bound to account.

Claim for time and services.

A trustee may be compelled to give an account of the execution of the trust (*h*). He is not allowed to charge any remuneration for giving his time or services,—a rule which extends to all persons filling a fiduciary character, as executors, and the like; notwithstanding he may have rendered the services in a professional capacity, as a solicitor. But the trust may expressly

(*a*) *Hodson's Settlement*, 9 Hare, 118; 20 L. J. C. 551.

(*b*) *Bignold's Settlement*, L. R. 7 Ch. Ap. 223; 41 L. J. C. 235; see *re Blanchard*, 3 D. F. & J. 131; 30 L. J. C. 516.

(*c*) *Coombes v. Brookes*, 41 L. J. C. 114; see Bankruptcy Act, 1869, s. 117.

(*d*) *Tunstall's Will*, 4 D. & Sm. 421.

(*e*) *Stokes Trust*, L. R. 13 Eq. 333.

(*f*) *Re Tempest*, L. R. 1 Ch. 485.

(*g*) *Forster v. Abraham*, L. R. 17 Eq. 351.

(*h*) *Lewin*, 448.

direct the allowance of a remuneration for time and services, professional or otherwise (*a*).

A trustee may charge the expenses actually incurred by him in the protection and maintenance of the trust property and in the execution of the trust;—and he may charge the payment of agents employed on proper occasions, as bailiffs, collectors of rents, solicitors, accountants, and the like (*b*). He has a lien upon the trust property for the amount of his expenses; but agents employed by him have no claim except against him personally (*c*).

Claim for expenses,—
of agents, etc.

A trustee is, in general, entitled to be indemnified by his *cestui que trust* against any loss or liability arising in the proper execution of the trust (*d*).

Claim to indemnity.

A trustee is chargeable with loss occasioned by breach of trust or by negligence; and a trustee is bound to the same care on behalf of his *cestui que trust* as he would take on behalf of himself (*e*).

Liability for breach of trust or negligence.

A trustee is, in general, liable for the default, fraud, or negligence of agents employed by him (*f*). But an exception is made with bankers, solicitors and other like professional agents employed of necessity and in the ordinary and regular course of business, and without any personal negligence in the trustee (*g*).

Default of agent

But one of joint trustees is not chargeable with the

Liability for default of co-trustee.

(*a*) 1 Sanders, 373; Lewin, 406–409; *Robinson v. Pett*, 3 P. Wms. 251; 2 W. & T. L. C. 219, and see notes *lb.*; *Broughton v. Broughton*, 5 D. M. & G. 160; 25 L. J. C. 250.

(*b*) 1 Sand. 374; Lewin, 411, 412.

(*c*) Lewin, 414, 416.

(*d*) Lewin, 417; see *James v. May*, 42 L. J. C. 802, 804; L. R. 6 H. L. 328. It was formerly usual to insert in settlements an express provision for the indemnity and reimbursement of trustees, but it is now rendered unnecessary by the 22 & 23 Vict. c. 35, s. 31. See 2 Pri-

deaux, Convey. 180.

(*e*) Lewin, 224; *Jones v. Lewis*, 2 Ves. sen. 240; *Massey v. Banner*, 1 J. & W. 241.

(*f*) *Sutton v. Wilders*, L. R. 12 Eq. 373; 41 L. J. C. 30; *Budge v. Gummow*, L. R. 7 Ch. 719; 41 L. J. C. 520.

(*g*) Lewin, 194; *Massey v. Banner*, *supra*; *Clough v. Bond*, 3 M. & C. 490; *Johnston v. Newton*, 11 Hare, 160; 22 L. J. C. 1039; *Sutton v. Wilders*, *supra*, p. 377; *Re Bird*, L. R. 16 Eq. 203.

neglect or default of another. Each is bound to join in all acts in execution of the trusts, and therefore upon a joint receipt he can be charged only with so much of the trust property or its produce as has come to his hands; unless fraud or negligence can be charged against him personally (a).

Trustee must account for profits of trust.

It is a general principle of equity that a trustee shall not acquire to himself any profit from the trust. Whatever profit or benefit may accrue from the trust or trust property is impressed with the same trust, and must be accounted for to the *cestui que trust* (b).

Profits made by use of trust property.

Accordingly, a trustee who employs the trust property for any business or purpose of his own, while he is liable for all losses, may be compelled to account to the *cestui que trust* for all the profits actually made by such use of the property (c); nor can he set off such profits against loss upon other portions of the trust funds for which he is responsible (d).

Purchase of trust property by trustee.

Upon the same principle if a trustee for sale purchase the trust property for himself, (unless by leave of the Court,) the sale may be set aside at the suit of the *cestui que trust* (e). "The Court will set aside every sale out of Court to a trustee, and will further fix him with the price he proposed to give in the event of the property not fetching more upon a resale" (f). If he has resold at an advance, he may be compelled to account for the excess above what he himself gave (g).

(a) 1 Sanders, 375; Lewin, 200.

(b) Lewin, 211; *Webb v. Earl of Shaftesbury*, 7 Ves. 488; *Sugden v. Crossland*, 3 Sm. & G. 192; 25 L. J. C. 563.

(c) 2 W. & T. L. C. 233, in notes to *Robinson v. Pett*; Lewin, 213; *Docker v. Somes*, 2 M. & K. 655; see *Burdick v. Garrick*, L. R. 5 Ch. 233; *Vyse v. Foster*, L. R. 8 Ch. 309, 333; 42 L. J. C. 245, 251; *Knox v. Gye*, L. R. 5 H. L. 656; cases of partnership assets retained

in business after a dissolution of partnership.

(d) *Wills v. Gresham*, 2 Drew. 258; 23 L. J. C. 667.

(e) 1 Sanders, 362; Lewin, 335; *Fox v. Mackreth*, 2 Bro. C. C. 400; 1 W. & T. L. C. 104.

(f) *Tenant v. Trenchard*, L. R. 4 Ch. 537, 546; as to the terms on which the sale will be set aside, see Lewin, 340.

(g) *Fox v. Mackreth*, *supra*; Lewin, 343.

So, if a trustee buy in an incumbrance or charge upon the trust property for less than is due upon it, he will be deemed to hold it as trustee, with a lien or charge for his own benefit only to the extent of his purchase money (a). Purchase of incumbrance by trustee.

Upon the same principle the trustee of a renewable leasehold who takes a renewal in his own name, will be compelled to hold it upon the trusts of the former lease (b). A tenant for life, though not bound to renew leaseholds, if he does, is considered as a trustee, and holds the renewed interest upon the trusts of the settlement (c). Renewal of lease by trustee.

A trustee may purchase the interest of his *cestui que trust*; but the burden of proving the fairness of the transaction, if it be called in question, lies upon him, which if he fail in doing, the sale may be set aside (d). Purchase from cestui que trust

The doctrines above stated as to trustees apply generally to all persons standing in a fiduciary position relatively to the person by or on behalf of whom the property is sold, as executors, solicitors, or agents (e). But a tenant for life is not in a fiduciary position relatively to the remainderman, as regards a purchase from their trustees under a power of sale; although his own consent be required for an exercise of the power (f). And a mortgagee may buy from the mortgagor or from a prior mortgagee (g). Persons in fiduciary position.

(a) Lewin, 212.

(b) *Keech v. Sandford*, Cas. Ch. 61; 1 W. & T. L. C. 39; as to the duty of trustees to renew leaseholds, see Lewin 270; as to the apportionment of the costs of the renewal amongst the beneficial owners, see Ib. 277; *Bradford v. Brownjohn*, L. R. 3 Ch. 711; *re Wood's Estate*, L. R. 10 Eq. 572. See the statutory powers of renewal given by Lord Cranworth's Act, 23 & 24 Vic. c. 145, ss. 8, 9, and 23 & 24 Vict. c. 124, ss. 35-38.

(c) Lewin, 270; *Stone v. Theed*,

2 Bro. C. C. 248.

(d) Lewin, 337; *Luff v. Lord*, 34 Beav. 220; *Gray v. Warner*, 42 L. J. C. 556; L. R. 16 Eq. 577.

(e) Lewin, 339; 1 W. & T. L. C. 143, notes to *Fox v. Mackreth*; see *Guest v. Smythe*, L. R. 5 Ch. 551.

(f) *Howard v. Ducane*, T. & R. 81; *Dicconson v. Talbot*, L. R. 6 Ch. 32.

(g) *Knight v. Marjoribanks*, 2 Mac. & G. 10; *Kirkwood v. Thompson*, 34 L. J. C. 305, 501; but see *Ford v. Olden*, L. R. 3 Eq. 461; 36 L. J. C. 651.

PART II.

ESTATES IN LAND.

CHAPTER I. The Limitation of Estates as to quantity.

II. The Limitation of Future Estates.

Estates in land,
—as to quantity,

—as to time of
commencement.

Property in land is divided into estates or interests measured by the quantity or duration of the use and enjoyment; and such estates, in regard to the time of commencement, may be either in possession or future.

Accordingly this part is divided into two chapters treating respectively,—of the limitation of estates as to quantity or duration,—of the limitation of future estates (*a*).

The limitation of
estates.

Estates are defined and ascertained by the terms of limitation in which they are legally expressed and conveyed.—“It is the province of a limitation to mark the period or event for the commencement, and the time of continuance or duration of an estate, either by years, lives, or the series of heirs; also the determinable qualities of an estate; as for twenty-one years, if A. should so long live,” etc. (*b*).

Distinction between words of limitation and words of purchase.

The use of words in limiting or defining an estate requires to be carefully distinguished in practice from the use of words in appropriating the estate to the purchaser, as the person is commonly called to whom the estate is

(*a*) See *ante*, Introduction, p. 9.

(*b*) Preston's Shepp. Touch. 117.

destined. Many words, as "heirs," "issue," "children," etc., are capable of a double import, as words of limitation and words of purchase; and they are often used ambiguously, especially in wills. The rules of construction occasioned by such cases of ambiguity form a considerable part of the law of limitation of estates, and will be found in the proper places in the following pages.

The word purchase (*perquisitio*) is applied in law to any lawful mode of acquiring property by the person's own act or agreement, as distinguished from acquisition by act of law, as descent, escheat and the like. A purchase in the above sense includes acquisition not only under a contract of sale for a valuable consideration, but also by gift or without consideration, and by devise (*a*). Meaning of purchase.

The various estates which may be limited or created in land may be conveniently treated in the order of their magnitude or duration, and accordingly will form the subjects of the sections in which the first chapter of this part is divided.

But the terms of limitation vary in construction and effect as applied under the different systems of common law and customary law, of uses executed by the statute and trusts administered in equity. They also vary with the occasion of use, as employed in contracts, conveyances *inter vivos*, and wills. Therefore, to complete the view of estates, it is necessary to collect the rules and doctrines of limitation as they appear in the above systems and as they are applied in different instruments. Variations of limitations.

The common law of freehold tenure is adopted, generally, as the standard rule of limitation and construction, and is followed in the other systems of estates, but with the modifications, if any, allowed or required by the quality of Standard rule of the common law.

(*a*) Lit. s. 12; Co. Lit. 18 *b*; 2 Blackst. Com. 241; see the meaning of the term discussed in *Askew v. Root*, L. R. 17 Eq. 426.

the estate and the occasion of application ; and upon this principle the contents of the following sections are for the most part arranged. The rules there laid down may be considered of general application, unless qualified by the context, or unless some exception or modification be expressly noticed (*a*).

(*a*) As to customary estates, see uses, *ante*, p. 111 ; as to equitable *ante*, p. 80 ; as to limitations of estates, *ante*, p. 139.

CHAPTER I.

THE LIMITATION OF ESTATES AS TO
QUANTITY.

- Section I. Fee simple.
- II. Fee tail.
- III. Estates for life.
- IV. Estates for years.
- V. Tenancy at will.
- VI. Conditional limitations and conditions.
- VII. Equitable estates and interests in land.

SECTION I. FEE SIMPLE.

- § 1. The limitation of a fee simple in conveyances.
- § 2. The limitation of a fee simple in wills.

§ 1. THE LIMITATION OF A FEE SIMPLE IN CONVEYANCES.

Fee simple—limitation to “heirs” necessary to pass a fee—exceptions to the rule.

Rule in *Shelley's* case.

Limitation to “heirs” as purchasers—imports fee simple—descendible from ancestor—limitation to heirs of grantor.

Meaning of “heir” as word of purchase—heir not ascertained until death of ancestor—presumptively means heir at law—“heir male”—“heir now living.”

A fee simple is the largest estate known to the law. Fee simple
The term *fee* here signifies inheritance, an estate that is heritable or descends to heirs; and *simple*, that it descends to the heirs general, without any restriction of the course of inheritance (a).

In conveyances at common law, a fee simple is limited

(a) Lit. s. 1, 11; Co. Lit. 1 b, 2 a; 2 Blackst. Com. 106; *ante*, p. 33.

Limitation to
"heirs" neces-
sary to pass a
fee.

in the terms "to A. and to his heirs," the technical limitation to the "heirs" being necessary to make a fee or estate of inheritance. A conveyance "to A.," or "to A. for ever," or "to A. and his assigns for ever," or the like, without the limitation "to his heirs," gives only an estate for life, for want of the words of inheritance (a).

to A. or his heirs.

So, a grant to A. or his heirs conveys to A. only an estate for life (b); but a grant to A. or his heirs, to hold to him and his heirs is a fee (c).

to A. and his
"heir."

A grant to A. and to his "heir," would, it seems, give a fee simple, the word 'heir,' though in the singular number, being construed as *nomen collectivum*, including the heir and his heirs (d).

Exceptions to
the rule.

Some apparent exceptions may be found to the rule that a limitation to "heirs" is necessary to pass a fee,—as where the word "heirs" is included in the limitation by reference to another instrument containing it,—or by reference to a former limitation in the same instrument, as by the phrase *in formā prædictā* (e).

Exceptions by
special custom.

Exceptions to the rule occur with copyholds in some manors where by special custom equivalent expressions are used; thus the words *sequels in right, sibi et suis, sibi et assignatis*, or *to him and his*, are in some

(a) See *ante*, p. 34; Lit. ss. 1, 283, 465, 468. 469; Co. Lit. 9 a, 20 a. "For if a man purchase lands by these words, to have and to hold to him for ever; or by these words, to have and to hold to him and his assigns for ever; in these two cases he hath but an estate for term of life, for that there lack these words 'his heirs,' which only make an estate of inheritance in all feoffments and grants." Lit. s. 1.

(b) Co. Lit. 8 b; 5 Co. 112 a, *Mallory's Case*.

(c) 1 Ves. sen. 411, *Wright v. Wright*; being construed according to the *habendum*, see *post*, Part IV. Chap. I. 'Conveyances.'

(d) Hargrave's note (4) to Co.

Lit. 8 b; Ambl. 457, per Eyre, C. J., commenting on Co. Lit. 8 b, 22 a.

(e) Co. Lit. 20 b; also in releases of certain kinds to a person already seised in fee, as by one joint tenant to another, see *post*, Part IV. Chap. I. 'Conveyance.' In partitions and exchanges which do not alter or affect the title, see *post*, Part V. Chap. I. 'Joint tenancy.' In grants to corporate bodies and their successors, having perpetual succession, see *post*, Part V. Chap. II. 'Corporations.' And in some other cases now obsolete. Co. Lit. 9 b. The word "heirs" as a word of purchase imports a fee without adding, and to their heirs. See *post*, p. 157.

instances the customary form of limiting an inheritance in copyhold (a).

The limitation "to A. for life" and the limitation "to A." being equivalent, a limitation "to A. for life and afterwards to his heirs," or "with remainder to his heirs," or any like expression importing that after the decease of A. his heirs are to take according to the rules of inheritance, is construed as equivalent to the limitation "to A. and to his heirs," and conveys to A. an estate in fee simple. This is the simplest application of the rule in *Shelley's case* (b).

The word "heirs" or "heir" may be used, not as a word of limitation of estate, but as a word of purchase or designation of the purchaser; as, where a limitation is made to the "heirs" of a person without any preceding estate being given to the ancestor to which the word can be referred as a term of limitation, it must be taken as a term of purchase (c).

The construction of the limitations "to A. and to his heirs" or "to A. for life with remainder to his heirs" or to the like effect, is not altered by the fact of A. being dead at the time of making the limitations; they import a fee simple in A., and are then merely void of effect by reason of his non-existence, and his heirs take nothing (d).

The word "heirs" used as a word of purchase, "imports an estate in fee simple without any superadded words of limitation. According to Coke,—“where the remainder is limited to the right heirs of B. it need not be said, and to their heirs; for being plurally limited, it includeth a fee simple, yet it resteth but in one by purchase” (e).

(a) 4 Co. 29 b; Scriven on Cop. 99; see *ante*, p. 80.

(b) *Ante*, p. 34; the rule will be more fully stated and explained in treating of remainders, see *post*, Chap. II. Sect. I.

(c) See above; Co. Lit. 10 a; see *Cholmondeley v. Clinton*, 2 Mer. 171.

(d) 1 P. Wms. 397, 400, in *Goodright v. Wright*.

(e) Co. Lit. 10 a.

Rule in *Shelley's case*.

Limitation to heirs as purchasers.

Limitation to A. and his heirs, A. being dead.

Limitation to "heirs" imports a fee simple without further limitation.

The word 'heir' in the singular, as a designation of the purchaser, has not the same effect in a deed and requires further words of limitation to pass the fee (*a*).

Descent to be traced from the ancestor.

By the Inheritance Act, 3 & 4 Will. IV. c. 106, s. 4, it is enacted "that when any person shall have acquired any land by purchase under a limitation to the heirs of any of his ancestors, contained in an assurance executed after 31 December, 1833,—such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land (*b*).

Limitation to heirs of grantor.

A person could not by any common law assurance make his own heir a purchaser; the limitation of a remainder to his own heirs was inoperative, and he remained entitled as of his former estate. By the statute 3 & 4 Will. IV. c. 106, s. 3, such limitation (in any assurance executed after 31 December, 1833) has the effect of vesting the estate in him as a purchaser and not as his former estate (*c*).

Meaning of heir as word of purchase.

Heir not ascertained until death of ancestor

Heir presumptively means heir at law.

Heir qualified by description.

Heir male.

The designation of a person as "heir" is necessarily uncertain until the death of the ancestor; for there can be no heir to a living person; as expressed in the maxim, *nemo est hæres viventis* (*d*).

It presumptively means the heir at law, and not the customary heir, even where the land conveyed is subject to gavelkind or other customary rule of descent (*e*).

Additional words of description may further particularise the heir intended as purchaser, as heir *male*, under which designation in a deed, it seems, the purchaser must answer the condition of being *the very* heir and a

(*a*) 2 M. & Cr. 387, *Chambers v. Taylor*, but in a will, see *post*, p. 160.

(*b*) See *post*, p. 173; and see *post*, Part IV. Chap. III. 'Descent.'

(*c*) See *ante*, p. 52; as to uses limited to the heir of the grantor, see *ante*, p. 115, and see *post*, Chap. II. Sect. II. 'Future Uses.'

(*d*) Co. Lit. 8 b, 22 b.

(*e*) Co. Lit. 10 a; *ante*, p. 25; so in devises to the heir, *Thorpe v. Owen*, 2 S. & G. 90; 23 L. J. C. 286; *Sladen v. Sladen*, 2 T. & H. 369; 31 L. J. C. 775; and see Hawkins on Wills, 168; 2 Jarman on Wills, 1.

male; so with a limitation to an heir *female*. Thus, under a limitation by deed to the "heir female" of A., if A. die leaving a son and a daughter, the son cannot take because, though heir, he is not female, nor can the daughter take because, though female, she is not heir (a). The additional description may, however, qualify the meaning of the word 'heir,' as in the designation of 'heir *now living*,' which in the life of the ancestor can only mean the heir then apparent or presumptive (b). The purchaser under such restrictive descriptions of heir will take only an estate for life unless there be further words of limitation to give him the fee (c).

§ 2. LIMITATION OF FEE SIMPLE IN WILLS.

Devise to "heirs" as word of limitation.

Rule in Shelley's case applied to wills.

Devise to "heirs" as devisees—imports fee simple—descendible from ancestor—devise to testator's own heir.

Meaning of "heir," as designation of devisee—"heir" with additional description—"heir" qualified by description.

Devise without words of limitation under the Wills Act, passes fee simple—not under the Wills Act, passes estate for life, unless contrary intention appear.

Devise without words of limitation, passing fee simple by apparent intention—devise of estate, property, etc.—in fee simple, for ever, etc.—devise of power of disposition—fee simple implied from devise over—implied from charge on devisee.

Devise to trustees passes fee simple, unless definite estate limited—estate limited by purposes of the trust.

A devise "to A. and to his heirs" receives the same construction as a limitation in like terms in a deed, and

Devise to "heirs" as word of limitation,

(a) Co. Lit. 24 b; Hargrave's note (3) ib.; Co. Lit. 164 a; Hargrave's note (2) ib.; as to the expression "heir male" in a will, see *post*, p. 163, 176; as to "heir male

of the body," see *post*, p. 173.

(b) *Chambers v. Taylor*, 2 My. & Cr. 376; *James v. Richardson*, 1 Vent. 334; 2 ib. 311.

(c) *Chambers v. Taylor*, *supra*.

to A. and his heir.

confers a fee simple (a). A devise to A. and to his "heir" (in the singular) has the like effect, the word heir being construed as *nomen collectivum* to include the heirs of such heir (b).

to A. or his heirs.

A devise "to A. or his heirs" is read as "to A. and his heirs," and gives a fee simple to A., and no substitutional gift to his heirs; consequently, upon the death of A. in the lifetime of the testator the devise would lapse, and the heirs would take nothing (c).

to A. and his heirs during their lives.

A devise "to A. and his heirs, during their lives" creates a fee simple, the words "during their lives" expressing merely the fact that the enjoyment of an estate of inheritance can only last during life (d).

Rule in Shelley's case.

The rule in *Shelley's* case applies to limitations in wills; accordingly, if a devise be made to A. for life, and be followed by a devise by way of remainder to the heirs of A., the word "heirs" is construed as a word of limitation, and not as a designation of the devisee, and is referred to the estate of the ancestor (e).

Devise to "heirs" as devisees.

The words "heir" or "heirs" may be used as a word of purchase designating the devisee; as where there is no previous devise to the ancestor to which it can be referred as a term of limitation (f).

Imports fee simple.

A devise to the "heirs" of A. or to the "heir" of A. (in the singular) confers a fee simple without further words of limitation; "heir" being generally construed in a will as *nomen collectivum* embodying the heir and his heirs (g).

(a) *Ante*, p. 156.

(b) 2 Jarman on Wills, 2; *ante*, p. 156.

(c) 1 Jarman, 452; Hawkins, 180; see *Read v. Snell*, 2 Atk. 642; *Wright v. Wright*, 1 Ves. sen. 409; *Greenway v. Greenway*, 2 D. F. & J. 128; 29 L. J. C. 601.

(d) *Doe v. Steulake*, 12 East, 515; and see *Hugo v. Williams*, 41 L. J.

C. 661; L. R. 14 Eq. 224.

(e) See *ante*, p. 34, 157; Fearn, C. R. 186; see further as to the application of the rule to wills, *post*, Chap. II. Sect. III. 'Future Devises.' 2 Jarman on Wills, 241.

(f) See *ante*, p. 157.

(g) *Ante*, p. 157; 2 Jarman on Wills, 2.

The statute 3 & 4 Will. IV. c. 106, s. 4, enacts, to the same effect as above stated with deeds, "that when any person shall have acquired any land by purchase under a limitation to the heirs of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after 31st December, 1833,—such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land" (a).

Descendible from the ancestor.

A devise to the testator's own heir or heirs of land which the heir would have taken by descent, was considered at common law to be merely descriptive of his title by descent, and the heir took the land in fee simple by descent and not as devisee. But by the statute 3 & 4 Will. IV. c. 106 (the Inheritance Act), s. 3, it was enacted "that when any land shall have been devised by any testator who shall die after the 31st December, 1833, to the heir or to the person who shall be heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent" (b).

Devise to testator's own heir.

Heir takes as devisee.

The word "heir" as used in a will to designate the devisee, is to be construed, in general, according to its strict technical meaning as the person ascertained upon the death of the ancestor to take an inheritance of freehold tenure by the rules of common law ; and that, though

Meaning of "heir" as designating the devisee.

(a) *Ante*, p. 158 ; and see as to this enactment, *post*, p. 172.

(b) "A leading principle which the authorities seem clearly to establish is that whenever a *devise* gives to the heir the same estate in *quality* as he would have by *descent*, he shall take by the *latter*, which is the title most favoured by the law ; and that merely charging the estate with debts or legacies will not break the descent." Hargrave's note (2) to Co. Lit. 12 b ; 1 Jarman on Wills, 67 ; *Doe v. Timmis*, 1 B. & Ald. 530. Whether under the new law the heir can disclaim the devise and

rely upon his title by descent, see *Doe v. Smyth*, 6 B. & C. 112 ; *Bickley v. Bickley*, L. R. 4 Eq. 216.

"The legal import of a limitation by will to the heirs or right heirs generally, (as distinguished from a devise to the individual heir,) of the testator, which does not appear to be altered by the Act, is equivalent to a declaration of intestacy as regards the estate to which it applies." 1 Hayes Conv. 318, 5th ed. ; it has the negative effect of excluding it from a residuary devise. *Ib.* p. 315 ; *Robinson v. Knight*, 2 Eden, 155.

the land devised be of customary tenure with a different rule of descent (*a*).

Heir with additional description.

The word "heir" may be used to designate the devisee with some additional description, and in such case also the general rule is that the word "heir" is to be construed in its strict legal sense, unless a clear intention to the contrary be manifested in the will:—Thus, a devise to the testator's "heir of his name" means the *very heir*, as well as of the name, and the devisee must satisfy the double description (*b*). So, a devise "to the right heirs of me (the testator) my son excepted," was construed as requiring the devisee to be the very heir of the testator and not his son, which, whilst the son was living, was impossible, and the devise was held void (*c*).

Heir qualified by additional description.

But the strict meaning of the word "heir," as a designation of the devisee, may be qualified by the additional words of description according to the manifest intention; as in the case of a devise to the "heir now living" of a person, which must be taken to mean the heir apparent or presumptive (*d*). So, a devise to the heirs of a woman, "as if she had continued sole and unmarried," excludes the lineal heirs (*e*). And a testator may by the context of his will, expressly name or impliedly point out the person whom he intends as devisee under the designation of heir; and such intention must prevail (*f*).

Heir male.

Upon the same principle of conforming the construction to the intention, the words "heir male" or "heirs male"

(*a*) See *ante*, p. 158; 2 Jarman on Wills, 1, 21.

(*b*) *Couden v. Clerke*, Hob. 29, see Hargrave's note (3) to Co. Lit. 24 *b*; *Wrighton v. Macaulay*, 14 M. & W. 214, see *per Parke*, B. ib. 231; and see *Pearce v. Vincent*, 2 M. & K. 800; 2 Keen, 230; as to the constructions which may be put upon the word "name" in such devises, see 2 Jarman on Wills, 61.

(*c*) *Goodtitle v. Pugh*, Fearn, C. R. App. 573; 3 Bro. P. C. Toml. 454; 3 Mer. 348, described as "an

extraordinary decision," in which "we trace but very faintly the anxiety generally imputed to judicial expositors of wills, *ut res magis valeat quam pereat*." 2 Jarman on Wills, 21.

(*d*) *James v. Richardson*, 1 Vent. 334; 2 Ib. 311; *Chambers v. Taylor*, 2 M. & Cr. 376; *ante*, p. 159.

(*e*) *Brookman v. Smith*, L. R. 6 Ex. 291; 7 Ib. 271; 40 L. J. Ex. 161; 41 Ib. 114.

(*f*) 2 Jarman on Wills, 18.

used in a will as designating the devisee are, in general, construed to mean the heir male of the body or heir in tail; and not the very heir being a male, according to the stricter construction required in a deed (a). So "heir male of the body" is construed to mean the heir in special tail male, that is, the heir traced through males, and not the heir of the body or in tail general, being a male (b).

Heir male of the body.

Devises without words of limitation are subject to different rules, accordingly as they occur in wills which do or do not come under the operation of the Wills Act, 1 Vict. c. 26, which Act does not extend to any will made before 1st January, 1838 (sect. 34).

Devise without words of limitation.

By that Act, 1 Vict. c. 26, s. 28, the rule is laid down for the construction of wills in this respect, "that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appear by the will" (c).

Under the Wills Act, 1 Vict. c. 26, passes fee simple.

In wills made before 1st January, 1838, to which the Act does not extend, a devise of land without words of limitation is construed, in general, as in a deed, to pass only an estate for life (d).

In wills made before 1838—passes only estate for life.

But the want of technical words of limitation in a will

(a) See *ante* p. 158 : *post*, p. 176; see a devise to "the first heir male" of A. and the various constructions made by the judges upon it, *Doe v. Perratt*, 10 Bing. 198; 5 B. & C. 48.

(b) See *post*, pp. 173, 179.

(c) The statute does not apply to the creation of a new subject of property out of the land; thus a devise of a rent or annuity charged upon the testator's real estate, without words of limitation, creates such charge only during the life of the devisee, and is not extended by the

enactment beyond the terms of its creation. *Nichols v. Hawkes*, 10 Hare, 342; 22 L. J. C. 255. A devise of "the rents and profits" of the land or of "the income" of the land passes the fee-simple under the statute. *Mannox v. Greener*, L. R. 14 Eq. 456.

(d) Co. Lit. 9 b; 2 Jarman, 170, and cases there cited; Hawkins, 130; *Bolton v. Bolton*, L. R. 5 Ex. 145, 152; 39 L. J. Ex. 89, 92; *re Harrison's Estate*, L. R. 5 Ch. Ap. 408; 39 L. J. C. 501.

Devise without words of limitation passing fee simple by apparent intention.

may be supplied by other modes of expressing the intention; and a devise may be extended to a fee simple, according to certain rules of construction, which are still in full operation as to wills made before the above date, though as to more recent wills, their operation is diminished, if not altogether superseded, by the enactment above mentioned (a).

Devise of estate, interest, etc.

A devise of all the estate or estates, or all the property, or the share or interest of the testator in the land, or his estate at or in a certain place, or called by a certain name, or any other expressions which may be taken to denote the *estate and interest* in the land, and not merely the *land* itself, are sufficient to pass an estate of inheritance, without the word heirs or other expressions of limitation (b). The word "estate" includes real estate, unless restricted by the context of the will (c).

Inheritance.

Remainder.

A devise of the "inheritance" passes the fee without words of limitation; so a devise of a "remainder," or "reversion," as applied to a remainder or reversion in fee, carries the entire interest without words of limitation; but the terms "tenements" and "hereditaments" are taken to refer to the subject of property only, and not to include the estate or interest in it (d).

Tenements and hereditaments.

Devise in fee simple.

For ever.

A devise of land to a person "in fee simple" will pass that estate without the technical limitation "to his heirs" (e). So a devise to a person "for ever", which

(a) Co. Lit. 9 b, 322 b; "The effect of the enactment, it will be observed, is not wholly to preclude, with respect to wills made since 1837, the question, whether an estate in fee will pass without words of limitation, but merely to reverse the rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now an estate in fee will pass by such a devise, "unless a contrary intention shall appear by the will." 2 Jarman on Wills, 194.

(b) 2 Jarman, 181, and cases there cited; Hawkins, 131.

(c) 1 Jarman, 664; Hawkins, 53; *Longley v. Longley*, L. R. 13 Eq. 133, where a testator devised and bequeathed all his *estate* to trustees upon trusts which disposed of personal estate only, and it was held that the real estate passed though there was an intestacy as to the beneficial interest.

(d) 2 Jarman, 190, 191; *Doe v. Allen*, 8 T. R. 497.

(e) Co. Lit. 9 b.

imports during the indefinite continuance of his heirs (a). But the limitation "for ever" following a limitation to a special line of heirs, as an estate tail, imports no more than the indefinite continuance of that especial line of heirs, and has no effect in enlarging the estate (b).

A devise to a person in terms importing that he may dispose of the land at his absolute discretion will confer the fee simple, as a devise to a person "to give and to sell" (c). Thus, where a testator gave his estate to his widow "to be at her disposal in any way she may think best for the benefit of herself and family," it was construed to give the absolute interest, the latter words not amounting to an obligatory declaration of trust (d). But the addition of the words "to his assigns" after a devise to a person has, in general, no effect in enlarging the estate devised, for such words are taken to be merely descriptive of the power of alienation incident to the estate (e).

Upon a devise of land to a person without words of limitation, with a devise over if he dies under twenty-one or other specified age, it is implied that he takes the fee simple subject to the devise over (f). So where the devise over is,—if he die under age and without issue;—or if he die without issue living at his decease (g).

(a) Co. Lit. 9 b; Lit. s. 586; Co. Lit. ib.; *Heath v. Heath*, 1 Bro. C. C. 147. "If a man devise lands to a man *in perpetuum*, or to give or to sell, or in *feodo simplici*, or to him and to his assigns for ever; in these cases a fee simple doth pass by the intent of the deviser. But if the devise be to a man and his assigns without saying 'for ever,' the devisee hath but an estate for life." Co. Lit. 9 b; 2 Jarman, 180, the last position is altered by the Wills Act, *supra*.

(b) *Wright v. Vernon*, 28 L. J. C. 198, 204, 207; *Davie v. Stevens*, Doug. 324.

(c) Co. Lit. 9 b; 2 Jarman, 180; 1 Sugden Powers, 120, where see

as to the distinction between the limitation of an estate and of a power; and see *post*, Chap. II. Sect. IV. 'Powers.'

(d) *Lambe v. Elames*, L. R. 6 Ch. 597; compare *Curnick v. Tucker*, L. R. 17 Eq. 320, where a trust was held to be created by precatory words as to the mode of disposition; and see *ante*, p. 132.

(e) Co. Lit. 9 b; see L. R. 6 Ex. 306, *Brookman v. Smith*; *ante*, p. 34, 156.

(f) 2 Jarman, 175; Hawkins, 136. See L. R. 5 Ex. 152; 39 L. J. Ex. 92, *Bolton v. Bolton*.

(g) *Ib.*; as to a devise to A. with a devise over upon failure of his issue indefinitely, see *post*, p. 182.

Where a devise is made to a person until a certain age, with a devise over in the event of his death under that age, there would in general be implied a gift to him absolutely in the other event not mentioned, namely, of his attaining that age, and he would take the fee simple subject to the devise over (*a*) ; but if the first devise be expressly limited to his life, the devise over only in the event of his dying under a certain age would raise no such implication, as the alternative event is provided for by his life interest (*b*).

Devise in fee implied from charge imposed upon devisee.

Where lands are devised without words of limitation, but with a charge or duty imposed upon the devisee, as to pay a sum of money, or to pay debts or legacies, annuities, or with other burdensome obligation, the devisee takes the fee simple ; because an estate for life being uncertain in duration, might not be sufficient to indemnify him against the payment or performance required of him (*c*). Where the land only is charged, so that the charge is excepted out of the subject of the devise and the devisee is to take nothing until it is satisfied, this rule does not apply, and the charge then affords no inference as to the estate or interest intended (*d*). An estate expressly devised for life cannot be enlarged into a fee under the above rule (*e*) ; nor will a charge upon the person of the devisee import an estate in fee, where it is otherwise clear that an estate tail is devised, whether expressly or by implication (*f*).

Devises to trustees are now regulated, as to the estate taken, by the Wills Act, 1 Vict. c. 26, (which does not

(*a*) *Gardiner v. Stevens*, 30 L. J. C. 199 ; *Cropton v. Davies*, L. R. 4 C. P. 159 ; see *Savage v. Tyers*, L. R. 7 Ch. 357, 363 ; 41 L. J. C. 815.

(*b*) *Savage v. Tyers*, *supra*.

(*c*) 2 Jarman, 171, and cases there cited ; *Hawkins*, 134 ; *Blinston v. Warburton*, 2 K. & J. 400 ; 25 L. J. C. 468 ; *Lloyd v. Jackson*, L. R. 1 Q. B. 571 ; 2 Ib. 269 ; *Pickwell*

v. Spencer, L. R. 6 Ex. 190 ; 7 Ib. 105 ; 40 L. J. Ex. 132 ; 41 Ib. 73.

(*d*) Ib. ; *Burton v. Powers*, 26 L. J. C. 330.

(*e*) *Goodtitle v. Edmunds*, 7 T. R. 635 ; *Willis v. Lucas*, 1 P. Wms. 474.

(*f*) *Denn v. Slater*, 5 T. R. 535 ; *Doe v. Owens*, 1 B. & Ad. 318.

extend to any will made before 1 January, 1838,) with the result, it seems, that where the estate is not certainly defined, they presumptively take a fee simple (a).

Devise to trustees passes fee simple unless a definite estate be given.

Section 30 enacts "that where any real estate (other than a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

Section 31 enacts "That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

It is a general rule, modified now by the above enactments, that a devise to trustees shall be construed as conveying only so much of the legal estate as the purposes of the trust require; thus a devise in terms to trustees and their heirs, upon trust to pay over the rents to A. during his life, without any further trust, is construed as re-

Estate of trustees limited by purposes of the trust.

(a) "It is not easy to see why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other."—"The result, in short, is that trustees,

whose estate is not expressly defined by the will, must, in every case, and whatever be the nature of the duty imposed on them, take either an estate for life or an estate in fee." 2 Jarman on Wills, 229; see the sections compared, in Hawkins on Wills, p. 156.

stricted by implication to the continuance of the trust, and passes the legal estate only during the life of A (a).

SECTION II. FEE TAIL.

§ 1. The limitation of a fee tail in conveyances.

§ 2. The limitation of a fee tail in wills.

§ 1. THE LIMITATION OF A FEE TAIL IN CONVEYANCES.

Fee tail—general—special—male.

Words of inheritance necessary—heirs—issue, etc.

Words of procreation necessary—"heirs of the body"—"begotten" and "to be begotten"—"heirs" with limitation over upon failure of "heirs of the body."

Limitation of estate in special tail—in tail male or female—limitation to "heirs male."

Rule in *Shelley's* case applied to limitations to "heirs of the body."

Limitation to heirs of the body as purchasers—rule in *Mandeville's* case—meaning of "heir male of the body" as words of purchase.

Limitation of estates tail in copyholds.

Fee tail.

A fee tail is an estate of inheritance restricted in descent to a particular line of issue; there are different kinds of fee tail according to the differences of restriction:—
 General. a fee tail *general* is heritable by all the issue;—a fee tail
 Special. *special* is heritable only by the issue by a specified per-
 Male or female. son;—a fee tail *male* is restricted in descent to issue of that sex; and the descent must be traced wholly through males, so that the male issue of females are excluded, as well as all female issue;—so likewise with a fee tail female (b).

(a) 2 Jarman, 213; Hawkins, 143; *Baker v. Parson*, 42 L. J. C. 228; *Collier v. Walters*, L. R. 17 Eq. 252; 43 L. J. C. 216, where

see the rules stated for cutting down a devise to trustees and their heirs to a less estate than a fee.

(b) Lit. ss. 13-29; Co. Lit. 377 a.

Thus, land may be limited to a man for an estate in tail male with remainder to him for an estate in tail female ;—or it may be limited in tail male, with remainder to him in tail general ;—and under the latter limitations all his issue may inherit ; under the former limitations all the female issue of males and all the male issue of females would be excluded (*a*).

In conveyances at common law a fee tail general is limited by the words “to A. and to the heirs of his body.” The limitation to the “heirs” is necessary to create an estate of inheritance whether in fee tail or in fee simple ; “for every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants without the word “heirs” (*b*). The limitation to A. and to the “heir” of his body would it seems have the same effect as if the word “heirs,” in the plural, were used (*c*).

Words of inheritance necessary to create estate tail—heirs.

“If a man give lands or tenements to a man and to his seed, or to the issue or children of his body, he hath but an estate for life ; for that there wanteth words of inheritance.” So, where a man covenanted to stand seised to the use of his daughter and to the issue of her body, it was held that she had not an estate tail, but for life only (*d*).

Limitation to issue, etc.

And in the limitation of a fee tail it is necessary to add “of the body,” in order to denote and restrict the inheritance by the issue ; but those words may be supplied by other equivalent words of procreation. “If lands be given to a man, and to his heirs which he shall beget of his wife, or to a man *et hæredibus de carne sua*, or to a

Words of procreation—“heirs of the body.”

(*a*) Co. Lit. 25 *b*, 377 *a* ; *ante* p. 41.

that in *formâ prædictâ* do include the other.” Co. Lit. 20 *b*.

(*b*) Co. Lit. 20 *a* ; *ante*, pp. 35, 156 ; “Yet if a man give lands to A. *et hæredibus de corpore suo*, the remainder to B. in *formâ prædictâ*, this is a good estate tail to B. for

(*c*) Co. Lit. 22 *a* ; see *ante*, p. 156.

(*d*) Co. Lit. 20 *b* ; *Makepiece v. Fletcher*, Comyn, 457, and see *post*, p. 181, in note ; as to limitations to issue in wills, see *post*, p. 180.

man *et hæredibus de se* ; in all these cases these be good estates in tail, and yet these words *de corpore* are omitted" (a).

Heirs "begotten," or "to be begotten."

A limitation to a man and to his "heirs lawfully begotten," it is said, creates a fee simple for want of restriction to the issue, the words "lawfully begotten" not being referred to the ancestor ; but to a man and the "heirs of him (*i.e.* by him) lawfully begotten" would create an estate tail (b). The construction of the words "heirs of the body" as words of limitation, is not restricted by adding the word "begotten" in the past tense, or "to be begotten" in the future tense (c).

Heirs of the body "begotten," or "to be begotten."

To "heirs" with limitation over upon failure of "heirs of the body."

The limitation "to A. and to his heirs," with a limitation over "upon failure of the heirs of the body of A." to B. creates an estate tail in A. ; the word heirs in the limitation to A. is construed according to the limitation over to mean "heirs of the body," and the limitation over operates as a remainder (d).

Limitation of estate in special tail.

The limitation to A. and to the heirs of his body by B. his wife, or to his heirs by B., creates an estate in special tail restricted to the issue of A. by B. ; and if B. be not his wife, it is an estate in special tail by reason of the possibility of her becoming so (e).

(a) Co. Lit. 20 b ; see *Vernon v. Wright*, 7 H. L. C. 35 ; 28 L. J. C. 198. "To an estate tail is requisite in all gifts and limitations of uses, that the heirs be limited to be procreated or begotten of some body in certain, either by express words, or by words which are tantamount ; for these precise words (*de corpore*) are not necessary to the creation of an estate tail so long as there are words which are equivalent." 7 Co. 40 b, *Beresford's Case*.

(b) Hargrave's note (2) to Co. Lit. 20 b ; 7 Co. 40 b, *Beresford's Case*.

(c) Co. Lit. 20 b, "as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before."

2 Vernon, 545, *Cook v. Cook*.

(d) Co. Lit. 21 a ; Perkins, s. 171 ; see 1 P. Wms. 15 ; Ib. 57 n. ; *Idle v. Cook*, 1 P. Wms. 70 ; *Morgan v. Morgan*, L. R. 10 Eq. 99 ; 39 L. J. C. 493 ; it seems the same construction would apply if the limitation over was "upon failure of issue," Ib. ; see *Beresford's Case*, 7 Co. 40 a ; but as to the meaning of "issue," see *post*, p. 180.

(e) Lit. ss. 16, 29 ; Co. Lit. 20 b. "If lands be given to B. *et hæredibus quos de primâ uxore suâ legitime procrearet*, this is a good estate in special tail, albeit he hath no wife at that time." Ib. ; and see *Wright v. Vernon*, 23 L. J. C. 881 ; 28 Ib. 198 ; 7 H. L. C. 35.

The limitation "to A. and to his heirs males of his body" creates an estate tail male. So, a limitation to A. and to his heirs females of his body creates an estate tail female (a). Limitation of estate in tail, male, etc.

Gifts to a man and to the heirs of his body, or in tail general, and gifts in special tail to a man and his wife and the heirs of the bodies of the same are specified in the statute *De donis*, by which estates tail are constituted; other estates tail as the above in tail male or female are taken to be so by the equity of the statute (b).

A limitation "to A. and to his heirs males," or "to A. and to his heirs females," creates an estate in fee simple, because it contains no restriction to a particular line of issue; it is not limited by the gift of what body the issue male or female shall be. Inheritance by heirs general cannot be restricted to one sex, therefore the words males and females, having here no legal import, are rejected, and all the heirs, female as well as male, may inherit (c). Limitation to A. and to his heirs male.

The rule in *Shelley's* case, already noticed in its application to limitations "to the heirs," applies also to limitations to an ancestor for life followed by limitations "to the heirs of his body," or "to the heirs male of his body" or other like terms, signifying that his issue are to take in the succession of an entail; the words "heirs of the body," or other words of succession are then To A. for life with remainder to heirs of his body.—Rule in Shelley's case.

(a) Lit. ss. 21, 22; Co. Lit. 25 a. It is very unusual to create an estate in tail female; and the rule of descent amongst females in coparcenary seems to raise some difficulties in apportioning the shares in remote degrees from the first tenant in tail; see Hargrave's note (1) Co. Lit. 25 a.

(b) Lit. s. 21; ante, p. 37; as to the limits of the equity of the statute, see Lit. s. 31, and Co. Lit. ib.

(c) Lit. s. 31; Co. Lit. 27 a, b;

7 Co. 40 b, *Beresford's Case*; *Doe v. Martyn*, 8 B. & C. 497. "For no man can institute a new kind of inheritance not allowed by law." Co. Lit. 13 a; for the same reason "If a man giveth lands to a man to have and to hold to him, and his heirs on the part of his mother, yet the heirs on the part of his father shall inherit, and the words (on the part of his mother) are void." Ib. As to devises in the above terms, see *post*, p. 176.

referred to the estate of the ancestor as words of limitation, vesting in him an estate tail (a).

Limitation to
"heirs of the
body," etc., as
purchasers.

But if an estate be limited in terms to the "heirs of the body" or "heirs male of the body," etc., of a person, without any preceding estate being given to the ancestor to which those terms can be referred as words of limitation, they must be taken as words of purchase, or a designation of the purchaser; they then convey an estate of inheritance in tail to the person answering the description of heir of the body or heir male of the body of the ancestor named without further words of limitation (b).

Rule in *Mandeville's* case.

By a rule of law laid down in *Mandeville's* case, the words have a further special effect in rendering such estate descendible as if the ancestor named had been the purchaser and had taken the estate tail (c). Thus, a devise in the terms "to the right heirs of my grandfather deceased by his second wife also deceased for ever" was held, according to the above rule, to create an estate in tail special descendible from the grandfather (d).

The statute 3 & 4 Will. IV. c. 106, s. 4, enacts "that when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors (in an assurance executed after 31st December, 1833,)—such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land." This enactment, so far as it extends to limitations to "heirs of

(a) See *ante*, pp. 34, 157; Fearn, C. R. 28; *Philips v. Brydges*, 3 Ves. 120, the like with limitations of equitable estates.

(b) See *ante*, p. 157; Co. Lit. 26 b.

(c) *Mandeville's Case*, Co. Lit. 26 b; *Southest v. Stowell*, 1 Mod. 226, 2 Ib. 207; Fearn, C. R. 44, 80, where the limitation was "to the heirs male of the body;" *Egerton v. Brownlow*, 23 L. J. C. 348; see *per* Lord St. Leonards, Ib. p. 407; *All-*

good v. Blake, L. R. 7 Ex. 339; 8 Ib. 160; 42 L. J. Ex. 101, where the rule was applied to a devise to the testator's issue. See *post*, p. 186. But the rule in *Mandeville's Case* is applied only to recognised forms of entail, and a limitation to "issue," or heirs of the body, exclusive of certain lines of descent, is a limitation to which it could not be applied. *Allgood v. Blake*, *supra*.

(d) *Wright v. Vernon*, 7 H. L. 35; 23 L. J. 881; 28 Ib. 198.

the body," seems to be merely declaratory of the common law as laid down in *Mandeville's* case; it extends the same rule to limitations to "heirs," rendering the estate of the heir as purchaser descendible as if the ancestor had been the purchaser (a).

The words "heir male of the body" or "heir female of the body" used in deeds as words of purchase mean the heir in special tail male or female, that is to say, the heir of the body traced through males or females exclusively (b).

Meaning of "heir male of the body" as words of purchase.

The doctrine laid down by Coke was that such expressions describing a purchaser should be construed (according to the general doctrine that "heir" means the *very* heir,) in the strict meaning of heir of the body, that is, heir in tail general, with the superadded condition of being a male or female; and accordingly he puts the case, "if A. have issue a son and a daughter, and a lease for life be made, the remainder to the heirs females of the body of A. A. dieth, the heir female (daughter?) can take nothing, because she is not heir; for she must be both heir and heir female, which she is not, because the brother is heir" (c).

General rule that heir means the very heir.

But this doctrine is inconsistent with the well acknowledged rule in *Mandeville's* case as applied to the like expressions, and it has been conclusively rejected. Thus, under a limitation to the heirs female of the body of A., a daughter being the heir in tail female was held to be entitled as against the daughter of a deceased son who was very heir of the body and a female; and the objection that the former did not answer the description *in toto* was clearly overruled (d).

Not applied to heir male of the body.

The general rule has been broken in upon only with

(a) See *ante*, p. 158.

(b) See *ante*, p. 158.

(c) Co. Lit. 24 a.

(d) *Goodtitle v. Burtenshaw*, Fearne, C. R. Ap. 570; and see *Wills v. Palmer*, 5 Burr. 2627; 1

W. Bl. 687; where the opinion of the court was expressed to the same effect as to the estate taken by purchase under the limitation in a deed to the "heir male of the body of A."

respect to words descriptive of heirs in tail ; and the words "heirs male" or "heirs female" used in deeds to designate the purchaser are construed strictly to mean the person answering the double description of *very heir* and a male or female (*a*).

Limitation of
estates tail in
copyholds.

Copyholds in some manors may be entailed by special custom, and, subject to the custom, limitations to a person and to the heirs of his body or in like terms, would be construed to create estates tail corresponding to the estates created by the like limitations of lands of freehold tenure. Such limitations, if applied to copyholds in manors wherein there is no custom of entail, are construed according to the rules of common law, under which, as the statute *De donis* does not apply to lands of customary tenure, they create fees simple conditional upon issue (*b*). The trust or equitable estate of a copyhold follows the legal estate, and cannot be entailed where the legal estate cannot (*c*).

(*a*) *Ante*, p. 158 ; *per* Parke, B.,
Wrightson v. Macaulay, 14 M. &
W. 231.

5 B. & Ald. 458 ; *Doe v. Simpson*,
4 Bing. N. C. 333 ; 3 M. & G. 929.

(*c*) *Pullen v. Middleton*, 9 Mod.
483 ; Scriven on Cop. 68, 4th ed.

(*b*) See *ante*, p. 81 ; *Doe v. Clark*,

§ 2. THE LIMITATION OF A FEE TAIL IN WILLS.

§§ 1. Limitations to "heirs of the body," etc.

§§ 2. Limitations to "issue", "children", etc.

§§ 1. LIMITATIONS TO "HEIRS OF THE BODY," ETC.

Devise to heirs of the body, etc., as words of limitation—to "heirs male"—to heirs with devise over upon failure of heirs of the body—to heirs with devise over to person capable of being heir.

Rule in *Shelley's* case—limitation to heirs of the body implied from devise over upon failure of such heirs.

Devise to "heirs of the body," etc., with additional words of limitation.

Devise to "heirs of the body," etc. with words of distribution superadded.

Devise to "heirs of the body," etc. as devisees—meaning of "heirs of the body" as devisees.

A devise by will to A. and "to the heirs of his body" creates an estate tail general in the devisee, the words "to the heirs of his body" being presumptively used as words of limitation with the same technical effect as in deeds (*a*).

A devise to A. or the heirs of his body is construed with the same effect (*b*). A devise to A. and "to the heir of his body" (in the singular) presumptively has the same effect and gives an estate tail to A. (*c*).

A devise to A. and to his "heirs lawfully begotten" creates an estate tail, begotten by him being understood (*d*).

Devise to "heirs of the body," etc., as words of limitation.

To A. or the heirs of his body.

To A. and the "heir" of his body.

To A. and his heirs lawfully begotten.

(a) See *ante*, p. 169.

(b) *Harris v. Davis*, 1 Coll. 416; see *Greenway v. Greenway*, 2 De G. F. & J. 128; 29 I. J. C. 601; in deeds, see *ante*, p. 156.

(c) 2 Jarman, 233; Hawkins, 174; *Richards v. Lady Bergavenny*, 2 Vern. 324; *Dubber v. Trollope*,

Ambl. 453; see *White v. Collins*, Com. 301; *Blackburn v. Stables*, 2 V. & B. 367, 371; *Chamberlayne v. Chamberlayne*, 6 E. & B. 625; 25 L. J. Q. B. 187, 357.

(d) *Nanfan v. Legh*, 7 Taunt. 85; *Good v. Good*, 7 E. & B. 295; but in a deed, see *ante*, p. 170.

To A. and his
"heirs male."

A devise to A. and his "heirs male,"—a limitation which in a deed would create a fee simple as above stated,—confers an estate in tail male; the words "heirs male" in a will being generally construed to mean "heirs male of the body" (a).

To A. and his
heirs with de-
vise over on
failure of heirs
of the body.

A devise to A. and his heirs, with a devise over upon failure of the heirs of his body, creates an estate tail in A.; the word "heirs" in the prior devise being explained by the devise over to mean "heirs. of the body" (b). So, a devise to A. and his heirs, with a devise over upon failure of his "heirs male," creates an estate tail; the words "heirs male" in a will being construed, as above stated, to be equivalent to "heirs male of the body" (c).

To A. and his
heirs, and upon
failure of heirs
to person capable
of inheriting.

A devise to A. and his heirs, and upon failure of heirs of A. to B., who is capable of being heir of A., creates an estate tail in A.; the word "heirs" is taken to mean "heirs of the body," because there could not be a failure of heirs general while B. exists (d). If the devise over upon failure of heirs of A. were to a stranger, it would be simply void as being a remainder limited after a fee simple (e).

Rule in *Shelley's*
case. Devise
to A. for life
followed by
devise to "heirs
of the body."

The rule in *Shelley's* case is applied to wills, so that a devise to A. for life, followed by a devise to the heirs of his body, or his heirs male, or any equivalent limitation, creates an estate tail in A., by referring the limitations to the heirs to the preceding devise to the ancestor

(a) Co. Lit. 27 a; *ante*, p. 171; *Denn v. Slater*, 5 T. R. 335; *Doe v. Colyear*, 11 East, 548; *Doe v. Easley*, 1 C. M. & R. 823; 2 Jarman, 232; Hawkins, 173.

(b) 2 Jarman, 237; as in a deed, see *ante*, p. 170; Hawkins, 175; as to a devise over upon failure of issue, see *post*, p. 181.

(c) *Denn v. Slater*, 5 T. R. 335.

(d) *Fearne*, C. R. 466; 2 Jarman, 238; Hawkins, 177.

(e) See *ante*, p. 41; *Tilburgh v. Barbut*, 1 Ves. sen. 89; *Ware v.*

Cann, 10 B. & C. 433. Thus, where a testator devised to his second son and his heirs, and for want of such heirs then to the right heirs of the testator, it was held that the son took an estate tail only because there could not be a failure of heirs while the brother lived, and Holt, C. J., said that though the eldest son should not take by the will but by descent, and so the devise over void of effect, yet it was sufficient to manifest the intention of the testator. *Nottingham v. Jennings*, 1 P. Wms. 23.

according to the rule (a). So a devise to A. for life followed by a devise to the "heir of his body," in the singular, is construed to create an estate tail in A. (b).

So, a devise to A. for life, with a devise over upon failure of the "heirs of his body" or the "heirs male of his body" or his "heirs male," creates an estate tail, general or male, in A.; there is implied an intermediate limitation to the heirs of the body, or the heirs male of the body, which is referred to the preceding devise to A. under the rule in *Shelley's* case (c).

A devise to A. or to A. for life, and to the heirs of his body *and the heirs of the body of such heirs* limits an estate tail in A.; the additional words of limitation merely express the course of descent involved in the previous limitation to the heirs of the body, and are therefore inoperative, according to the maxim *expressio eorum quæ tacite insunt nihil operatur* (d).

So, a devise to A. or to A. for life and to the heirs of his body *and their heirs* limits an estate tail in A.;—the additional words of limitation are taken as merely referring to the issue in tail (e). And the addition of the words "for ever," which would *per se* limit a fee simple in a will, does not alter this construction; but merely refers to the indefinite continuance of the heritable issue before mentioned (f).

A devise to A. and to the heirs of his body "for their respective lives" is an estate tail, the limitation for their lives expressing merely the necessary restriction of their successive enjoyment of the inheritance (g). And it seems

(a) See *ante*, p. 34, 157; 2 Jarman, 241; Hawkins, 184.

(b) *Ante*, p. 175; *Dubber v. Trollope*, Ambl. 453.

(c) 1 Jarman, 488; 2 Ib. 247; Hawkins, 200.

(d) 2 Jarman, 271; Hawkins, 185.

(e) Ib.

(f) *Wright v. Vernon*, 7 H. L. 35; 23 L. J. C. 881; 23 Ib. 198; see Fearn, C. R. 183, and see *per* Lord Mansfield, Doug. 324, in *Davie v. Stevens*.

(g) *Hugo v. Williams*, 41 L. J. C. 661; L. R. 14 Eq. 224; see *ante*, p. 33.

that, generally speaking, additional words of limitation which in effect would alter the course of descent must be rejected as repugnant to the previous limitation to the heirs of the body (a).

Heirs of the body with words of distribution superadded.

Also, words of distribution superadded to the limitation to the heirs of the body importing that they are to take concurrently and not successively, as in a devise to A. and to the heirs of his body *in equal shares*, are rejected as being repugnant to the estate conveyed by that limitation. Thus, where a testator devised to A. for life and after his decease to the heirs of his body in such shares as A. should appoint, and in default of appointment to the heirs of his body, share and share alike, as tenants in common, the words of appointment and distribution of estate were rejected, and it was held that A. took an estate tail (b).

Devise to "heirs of the body," etc.—as devisees.

"Heir" of the body.

But the words "heirs of the body" or "heirs male of the body" or "heirs male" or like words may be used in a will as words of purchase to designate the devisee; as where there is no devise to the ancestor to which they can be referred. And in such case they have the same effect as the like words in a deed in conveying an estate tail descendible as from the ancestor according to the rule in *Mandeville's* case. And it seems that the words "heir of the body," or "heir male," in the singular number, used alone as words of purchase would operate as *nomina collectiva* to confer an estate tail with the like effect (c).

"Heir of the body" with words of limitation.

The words "heir of the body" or "heir male", in the singular number, used with the words of limitation super-

(a) 2 Jarman, 276; Hawkins, 185.
(b) *Doe v. Featherstone*, 1 B. & Ad. 876; *Jesson v. Wright*, 2 Bligh. 1; and see *Slater v. Dangerfield*, 15 M. & W. 263, 272; *Jordan v. Adams*, 9 C. B. N. S. 483, 498, where see the law summed up by Cockburn,

C. J., and the cases cited; and see *Douglas v. Congreve*, 5 Scott, 223; 1 Beav. 59, where the words "in strict settlement" were rejected. 2 Jarman, 277, 331; Hawkins, 185.

(c) 2 Jarman, 3; see *ante*, pp. 156, 175.

added, become words of purchase designating the devisee, although there be a preceding devise to the ancestor (a). Thus, where lands were devised to A. for life and after to the next heir male of A. and the heirs male of the body of such next heir male, it was held that A. was tenant for life only with remainder in tail to the person who at his death would answer the description of his next heir male (b). So with a devise to A. for life, followed by a devise to the heir male of his body and the heirs of such heir male (c). And accordingly where lands were devised to A. for life, and after his death to the heir male of his body, *during the term of his life*, it was held that A. took an estate for life only and not an estate tail and that the heir male of his body took as devisee an estate for life (d).

To heir of the body for life.

The words "heirs of the body," "heirs male," or the like may also be made words of purchase by descriptions superadded, qualifying the meaning of the term heirs, or by expressions showing the intention to use it in a particular sense;—as heir male *of the testator's name*, heir of the body *now living* (e). And "heirs of the body" have been construed to mean children by reason of the will referring to the ancestor as their "father" (f).

"Heirs of the body" qualified by the context of the will.

The designation of the devisee as "heir male of the body," or "heir male" points to the heir male of the body in the course of entail, *i.e.*, the heir of the body traced through males, and not to the heir general of the body being a male (g).

Meaning of "heir male of the body," etc., as words of purchase.

(a) Fearn, C. R. 150, 178; 2 Jarman, 234; Hawkins, 174.

(b) *Archer's Case*, 1 Co. 66.

(c) *Willis v. Hiscox*, 4 My. & Cr. 197; *Chamberlayne v. Chamberlayne*, 6 E. & B. 625; 25 L. J. Q. B. 187, 357.

(d) *White v. Collins*, Com. 289.

(e) *James v. Richardson*, 1 Vent. 334; 2 Ib. 311; *Chambers v. Taylor*, 2 M. & C. 376; *Wrightson v. Macaulay*, 14 M. & W. 214; heir male of the body begotten of an European woman, see *Willis v. His-*

cox, 4 M. & C. 197, 201; and see 2 Jarman, 6, 13, 36; Hawkins, 186; *ante*, pp. 159, 162.

(f) *Jordan v. Adams*, 9 C. B. N. S. 483; see *post*, p. 186.

(g) 2 Jarman, 8; Hawkins, 170; *Doe v. Angell*, 9 Q. B. 328; *Lywood v. Kimber*, 29 Beav. 38, S. C. nom. *Lywood v. Warwick*, 30 L. J. C. 507. Coke's rule to the contrary is, so far, not law, see *ante*, p. 173; but as to the words "heir male" in a deed, see *ante*, pp. 158, 171.

§§ 2. LIMITATIONS TO "ISSUE," "CHILDREN," ETC.

Devise to "issue," as word of limitation—to A. and his issue—to A. for life and after his death to his issue.

Devise to A. and his heirs with devise over upon failure of issue—to A. for life with devise over upon failure of issue—upon failure of issue at death—to testator's heir, upon failure of issue of A.

Meaning of phrases "die without issue," etc., in wills made before 1838—construction under the Wills Act, 1 Vict. c. 26.

Devise to "issue" as devisees—devise to issue with words of limitation and distribution superadded—meaning of "issue" as devisees—application of the rule in *Mandeville's* case.

Devise to "children" as word of limitation—rule in *Wild's* case—"sons" as word of limitation—"family."

Devise to issue
as word of limi-
tation.

The word "issue" in its general meaning extends to all lineal descendants indefinitely, without any reference to inheritance. The only mode of giving legal effect to the word in this indefinite extension, is to construe it as a word of limitation equivalent to the words "heirs of the body," which include all issue, but as taking successively by descent. Hence a devise to A. and "his issue" is so construed, and creates an estate tail general in A.; unless it appear from the context to be restricted to issue of a certain degree, as children, or to issue existing at a given time, as at the death of a person, or to have some other meaning inconsistent with an estate tail; in which cases it must be taken as a word of purchase designative of the devisees intended (a).

(a) "Its ordinary meaning is all descendants; and when it is used in this sense it is equivalent to 'heirs of the body,' and the rules upon

those words to which I have already referred equally apply to limitations to issue of the body," *per* Willes, C. J., adopted in *Woodhouse v. Her-*

The construction is quite independent of the fact of there being or not being issue of the devisee living at the date of the will, or at any other period (a).

A devise to A. and his issue *living at his death* was held to create an estate tail, because by such construction only could the issue become entitled, the devise purporting to be immediate. Had the devise been to A. for life, *with remainder* to the issue *living at his death*, they would have taken a contingent remainder by purchase as devisees (b).

A devise to A., or to A. for life, followed by a devise in remainder or after his death "to his issue", gives A. an estate tail according to the rule in *Shelley's case* (c).

A devise to A. and his heirs, with a devise over upon failure of the issue of A. *indefinitely*, that is, at any time, creates an estate tail in A.; the word heirs being explained by the devise over to mean issue or heirs of the body (d). Upon the same principle a devise over upon the indefinite failure of issue of the heir of the testator creates an estate tail in the heir, as it imports that the inheritance is to be restricted to his issue (e).

rick, 1 K. & J. 352; 24 L. J. C. 649; *Bradley v. Cartwright*, L. R. 2 C. P. 511, 520. "The word 'issue' refers to procreation, not inheritance; the word 'heirs' to inheritance, and not procreation; and the words 'heirs of the body' to procreation and inheritance. But though this is the primary sense of the words taken by themselves, yet frequently the word 'heirs' taken with the context becomes 'heirs of the body'; and the word 'issue,' when used in a will in connection with previous life estates and with limitations in default of issue generally, refers to inheritance as well as procreation, and is equivalent to heirs of the body," *per cur.* L. R. 7 Ex. 354, in *Allgood v. Blake*.—"In the case of a deed, it is universally taken as a word of purchase," *per* Kenyon, C. J., in

Doe v. Collis, 4 T. R. 299; and a limitation in a deed to A. and to his issue conveys to A. and his then existing issue a joint estate for their lives, see *ante*, p. 169, *post*, Part V. Chap. I. 'Joint Tenancy'; and see 2 Jarman on Wills, 331.

(a) 2 Jarman on Wills, 329; it is otherwise with a devise to A. and his children, see *Wild's case*, *post*, p. 187.

(b) *University of Oxford v. Clifton*, 1 Eden, 473; see 2 Jarman, 330, questioning the decision; and see *Wild's case*, *post*, p. 188.

(c) *Ante*, p. 176; *Roddy v. Fitzgerald*, 6 H. L. C. 823; *Doe v. Rucastle*, 8 C. B. 876; 2 Jarman, 335; Hawkins on Wills, 190.

(d) 1 Jarman, 490; Hawkins, 175.

(e) 1 Jarman, 491; *Doe v. Walker*, 2 M. & G. 113.

To A. for life
with devise over
upon failure of
issue.

A devise to A., or to A expressly for life, with a devise over upon the indefinite failure of his issue creates an estate tail in A.; there is implied an intermediate limitation to the issue of A., in order to support the intention that the estate should not go over until the whole line of issue have been exhausted, which limitation is then referred to the preceding devise to A. by the rule in *Shelley's* case, and enlarges it to an estate tail; and the devise over takes effect as a remainder (a).

Devise over upon
failure of issue at
death.

A devise over upon the failure of issue *at the death* of A. has no effect in enlarging his estate for life to an estate tail, because it accords with the determination of such an estate tail only in the event of A. dying without leaving issue, and not in the event of his leaving issue; but it may, perhaps, be held to imply a devise in the latter event to the issue living at his death, in the absence of any express disposition, otherwise the issue would be unprovided for and the property undisposed of (b). The circumstance of the issue being unprovided for is, at least, a ground for construing the devise over on failure of issue, if possible, to mean an indefinite failure of issue, in order to imply an estate tail in A. (c).

Devise to heir
of testator on
failure of issue
of A.

A devise, upon the indefinite failure of issue of A., to the heir apparent or presumptive of the testator would, it is said, create an estate tail in A. by implication, in the absence of any express devise to him; such implication being necessary to effectuate the manifest intention that the heir should not take until the failure of the issue of A. (d).

Meaning of
phrases "die
without issue,"
etc., in wills be-
fore 1838.

In wills made before 1st January, 1838, (to which the Wills Act, 1 Vict. c. 26, does not extend, see sect. 34,)

(a) 1 Jarman, 489; 2 Ib. 247; Hawkins, 200.

(b) *Per* Hardwicke, L. C., 3 Atk. 784, 796, *Lethieullier v. Tracy*; 1 Jarman, 490, 497, 499; see *Ex. p. Rogers*, 2 Madd. 449.

(c) *Blinston v. Warburton*, 2 K. & J. 400; 25 L. J. C. 468, citing Prior on Issue, pl. 104.

(d) 1 Jarman, 487; see devise for life implied from devise to heir on death of A. Ib. 465; *post*, p. 193.

such phrases as "if A. die without issue, or without having issue, or without leaving issue," or "for want or in default," or "on failure of issue of A.," presumptively import failure of issue indefinitely or at any period, and give ground for the above constructions (a).

The meaning of such phrases, however, as importing indefinite failure of issue is only presumptive and yields to other expressions in the will restricting the meaning to a failure of issue at the death of the ancestor or other definite time (b). Where the words in question follow a devise to children, sons, or a particular class of issue, they may be construed, according to the prior objects, as meaning "such" issue only (c).

Restrictive expressions,—
failure at death.

Failure of
"such" issue.

By the Wills Act, 1 Vict. c. 26, s. 29, (not extending to wills made before 1st January, 1838, see sect. 34,) it is enacted, "That in any devise or bequest of real or personal estate the words "*die without issue*," or "*die without leaving issue*" or "*have no issue*," or any words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of issue; unless a contrary intention shall appear by the will by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person

Construction
under the Wills
Act.

(a) 2 Jarman, 418; Hawkins, 205; but the phrase, dying without *leaving* issue, applied to personalty, means without *leaving* issue at death, and the same distinction applies even where realty and personalty are comprised in the same gift. *Forth v. Chapman*, 1 P. Wms. 663. The legal meaning thus put upon the above phrases is said to be contrary to the ordinary construction of the English language, according to which they would import dying without having had or without

having issue, that is, failure of issue living at the death of A. *per* Lord Mansfield, *Denn v. Shenton*, 1 Cowp. 410, 411; and see *Doe v. Ewart*, 7 A. & E. 636, 647.

(b) 2 Jarman, 428, where the cases of restricted construction are noticed and fully discussed. Hawkins, 207; Lewis on Perpetuities, 190-252.

(c) See the rules for applying this referential construction and the effects of it discussed at length, in 2 Jarman, 372-397.

or issue or otherwise: provided that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Effect of enactment.

This enactment, it may be observed, makes no change in the law, as to the implications arising from limitations over upon an *indefinite* failure of issue; but it gives a new rule of construction to phrases importing failure of issue:—such that some phrases which occurring in wills before the statute are held to import an indefinite failure of issue, and all phrases which are, as to the time of failure, ambiguous, are construed under the statute to mean a failure of issue of the person in his lifetime or at his death, and not an indefinite failure of issue (a).

Devise to issue as devisees.

Where a devise is made to the "issue" of a person without any prior devise to the ancestor to which it can be referred as a term of limitation, the word "issue" must be taken as a word of purchase, designative of the devisee intended (b). And though there be a devise to the ancestor to which the limitation to the issue is presumptively to be referred, yet it may appear from the context of the will that the word "issue" is used with a meaning inconsistent with an estate tail, so that it must be taken to be a word of purchase, according to the following rules of construction.

"Issue" with words of limitation superadded.

A devise to A. or to A. for life and after his death to his issue and the *heirs of the body of such issue*, or the *heirs of such issue*, creates an estate tail in A. notwithstanding the superadded words of limitation of estate; such words being taken as merely an amplification of the word "issue" and included in it, and therefore not inconsistent with an estate tail in the ancestor (c).

(a) See 2 Jarman, 455; Hawkins, 216.

(b) See *ante*, p. 181.

(c) Hawkins on Wills, 195, and

But if to a devise in the above terms there be super-added words of distribution of estate importing that the issue are to take concurrently in shares or as *tenants in common*, and not in succession to the entirety, the word issue is then to be taken as a word of purchase designating the devisees; and this construction is not restricted or affected by a subsequent devise over upon failure of issue (which generally implies a preceding estate tail), for the devise over would be taken to refer to such issue only as would take under the prior devise as purchasers (a).

"Issue" with words of distribution super-added.

And if there be no superadded words of limitation, but there be sufficient apparent intention for the issue to take the fee by implication (as is now constructively the case with all wills made on or after 1st January, 1838, by the operation of the Wills Act, 1 Vict. c. 26, s. 28), the words of distribution of estate require the word issue to be taken as a word of purchase (b).

Words of distribution only.

Issue, as a word of purchase, *prima facie* designates all descendants existing at the time or of the kind referred to; and they take concurrently *per capita* and not *per stirpes* (c). "And although the devise is to the issue

Meaning of issue as devisees.

cases there cited; *per* Cranworth, L. C., *Parker v. Clarke*, 6 D. M. & G. 109.

(a) Hawkins on Wills, 192; *Slater v. Dangerfield*, 15 M. & W. 273, and cases there cited.

(b) Accordingly, the rule is stated to have been correctly laid down as follows that "where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only; and the result is the same whether the fee is given by the technical words, 'heirs,' or by such words as 'estate,' 'part,' 'share,' etc., occurring in the description of the subject of the gift, or words imposing a pecuniary charge upon the issue, and whether the gift to the issue be direct or by implication

from a power to appoint to them, and whether there is a gift over upon general failure of the issue or not; and the same rule applies where the issue would take an estate tail." 2 Jarman on Wills, 3rd ed. 417, adopted in *Bradley v. Cartwright*, L. R. 2 C. P. 511, 522; as to the devisees in fee without the technical limitation to the heirs, see *ante*, p. 164. In *Bradley v. Cartwright* the fee was implied in the issue from a power of appointment amongst them, as to which see *post*, Chap. II. 'Powers.' Contrast the effect of words of limitation or distribution superadded to the words "heirs of the body," and the superior technical effect of the latter expression, as stated *ante*, pp. 177, 178.

(c) 2 Jarman on Wills, 33; *Davenport v. Hanbury*, 3 Ves. 257;

begotten, that makes no difference; the words *begotten* and *to be begotten* are the same, as well upon the construction of wills as settlements, and take in all the issue after begotten" (a).

Meaning explained by context of will.

By reference to children, etc.

By reference to parents.

Issue to take in succession.

Rule in *Mandeville's* case.

The testator may give his own explanation of the meaning of the word issue by the context of the will;—as by a subsequent reference to the objects of the gift, as being children or sons; thus, in a will devising to the issue of A., "the eldest of such sons to be preferred before the youngest," it was held that issue was explained by the will to mean sons (b);—so by reference to the objects of a prior gift to children, sons, etc., as "such issue," the term issue may be restricted to the objects referred to (c);—so where there is a devise to a class of persons, with a devise over to the issue of any of the class dying before a certain period, and a direction that the issue should take the share of their *parents*, the reference to parents is held to restrict the meaning of issue to children; so where there is a devise to issue in such manner as their *father* or *parents* shall appoint (d).

The testator may show by the context of his will that he intends all the issue indefinitely to take in succession, as "heirs of the body," and then the word issue, as a word of purchase, like *heirs of the body* so used, gives to the first heir in tail an estate tail descendible from the ancestor according to the rule in *Mandeville's* case. Thus, where land was devised, after estates tail male to sons, "in default of such issue to all and every other the issue of my body," with a devise over in default of such issue to the testator's right heirs, it was held to

Lywood v. Kimber, 29 Beav. 38; S. C. nom. *Lywood v. Warwick*, 30 L. J. C. 507; see *Bradshaw v. Melling*, 19 Beav. 417; 23 L. J. C. 603; and they take jointly, if there be no words of severance, 1b.; Hawkins, 87; *post*, Part V. 'Joint Tenants.' (a) *Cook v. Cook*, 2 Vernon, 545; see *ante*, p. 170.

(b) 2 Jarman, 353; Hawkins,

196.

(c) 2 Jarman, 368; and the reference may be inferred without the use of the word "such." 1b. 372.

(d) 2 Jarman, 36; Hawkins, 88; *Sibley v. Perry*, 7 Ves. 522; *Pruen v. Osborne*, 11 Simon, 132; *Jordan v. Adams*, 9 C. B. N. S. 497; *Heasman v. Pearce*, L. R. 7 Ch. 275; 41 L. J. C. 705.

give an estate tail in remainder to the heir in tail general at the death of the testator; such intention being inferred from an expressed wish of the testator "to prevent the dispersion of his estates," and from the gift over in default of issue (a).

But the word "issue" alone will not bear this construction without aid from the context of the will. Accordingly, under a devise to the issue of J. S. simply, it was held that all the children and grandchildren (if any) took concurrently an estate for life. In wills now under the operation of the Wills Act, they would take the fee, which removes one argument in favour of the above construction (b).

The word "children" is presumptively a word of purchase, meaning issue in the first degree; but it may be explained by the context of the will to be used as a word of limitation, meaning "heirs of the body" (c). Thus, devises in the terms, "to A. and his children in succession,"—"to A. for life and after his decease to his children and so on for ever,"—"unto my daughter M., to her and her children for ever," have been construed to create estates tail (d).

A rule of construction was laid down in *Wild's* case, that a devise to A. and his children, if A. has no child at the time of the devise, creates an estate tail in A.; the

Devise to
"children" as
word of limita-
tion.

Rule in *Wild's*
case.

(a) *Allgood v. Blake*, L. R. 7 Ex. 339; 8 Ib. 160; 42 L. J. Ex. 101. See *ante*, p. 172.

(b) *Cook v. Cook*, 2 Vernon, 545; 2 Jarman, 35; see *ante*, p. 163.

(c) 2 Jarman on Wills, 69, 307; Hawkins, 198; see *per* Lord Hardwicke, in *Buffar v. Bradford*, 2 Atk. 222; *per* Knight Bruce, L. J., in *Earl Tyrone v. Waterford*, 29 L. J. C. 490; 1 D. F. & J. 613; *Webb v. Byng*, 2 K. & J. 672; S. C. in H. L. nom. *Byng v. Byng*, 31 L. J. C. 470.

(d) *Earl Tyrone v. Waterford*, supra; *Trash v. Wood*, 4 M. & Cr. 324; *Roper v. Roper*, 36 L. J. C. 270; 37 Ib. 7; where an estate was devised to A. and her children with certain chattels "as heir-looms with my estate," it was held that an estate tail was created by reason of the intention shown that the estate should pass by descent. *Byng v. Byng*, supra; and the word "child" may be used in a collective sense, as meaning heirs of the body. 2 Jarman, 318.

word children is to be taken as a word of limitation, because in that way only the children can take (a).

A devise to children as devisees *primâ facie* includes all the children in existence at the testator's death, and is not restricted to those existing at the time of making the devise; but with reference to the rule in *Wild's* case, as to whether the word "children" is to be construed as a word of limitation, the will is to be construed, it seems, according to the intention presumed from the existence or non-existence of children at the time of making it (b).

If a devise be made to A., and after his decease to his children, or with remainder to his children, although he have no child at the time, yet every child which he shall have after, may take by way of remainder, for the intent appears that the children shall not take immediately, but after the decease of the parent (c).

The word "sons" or "son" is capable of being construed as a word of limitation, equivalent to "heirs male of the body," giving an estate tail male, in order to effectuate the manifest general intention of the will (d). Thus, a devise in the terms "to A. for life, and after his decease that the eldest son of A. should

"Sons" or
"son" as words
of limitation.

(a) 6 Co. 17 a, *Wild's Case*. "For the intent of the devisor is manifest and certain that his children should take, and as immediate devisees they cannot take, because they are not *in rerum naturâ*, and by way of remainder they cannot take, for that was not the intent, for the gift is immediate; therefore there such words shall be taken as words of limitation." *Ib.*; 2 Jarman, 307; Hawkins, 198; *Roper v. Roper*, L. R. 3 C. P. 32; 37 L. J. C. P. 7.

(b) 2 Jarman, 310, but see the observations there made, and see *Buffar v. Bradford*, 2 Atk. 220. *Roper v. Roper*, *supra*, where the rule was held to apply, although there was a child *in ventre sa mère* (capable of taking as devisee, see

post, Chap. II. Sect. I. 'Contingent Remainders') at the time of the devise who was born after the testator's death, upon the ground that it was impossible to suppose that the testator could in fact have treated this child as the immediate object of the devise.

(c) 6 Co. 17 b, *Wild's Case*; and see as to the construction of future limitations to children, *post*, Chap. II. 'Contingent Remainders,' and 'Executory Devises;' as to bequests of personal estate in like terms, see 2 Jarman, 316, 499; Hawkins, 199; *Audsley v. Horn*, 1 D. F. & J. 226; 29 L. J. C. 201.

(d) 2 Jarman, 317; *Mellish v. Mellish*, 2 B. & C. 520; *Doe v. Garrod*, 2 B. & Ad. 87.

inherit the property during his life, and so on, the eldest son of the family to inherit the same for ever," was held to create an estate tail in A.; the words clearly indicating a series of inheritances and constituting words of limitation (a).

A devise to A. and his "family" is capable of being "Family," construed as a limitation, conferring an estate in fee or an estate tail; but the meaning of the word "family" seems in all cases to depend upon the context of the will, and may be altogether void for uncertainty (b).

SECTION III. ESTATES FOR LIFE.

Estate for life—for life of the tenant—*pur autre vie*—for several lives—for joint lives—for lives of the tenant and others.

Limitation of estates for life—grant to A. without words of limitation—to A. for life without expressing whose life—lease for several lives—for joint lives.

Devise of land without words of limitation, under the Wills Act—in wills not under the Wills Act—devise for life by implication.

Occupancy of estate *pur autre vie*—limitation of estate *pur autre vie* to special occupant—to the heirs—to the heirs of the body—to the executor or administrator—occupancy by statute.

Occupancy of copyholds—special occupant by designation—by custom—by statute.

Discovery of death of persons on whose lives estates depend—presumption of death.

An estate for life is limited for the term of the life of either of the tenant himself or of another person. In the former case the tenant is commonly called tenant for life; in the latter case he is distinguished as tenant *pur autre vie* (c).

(a) *Fosbrook v. Fosbrook*, L. R. 3 Ch. 93; see *Mannox v. Greener*, L. R. 14 Eq. 456.

(b) See 2 Jarman, 25; Hawkins, 90; *Lucas v. Goldsmid*, 29 Beav.

657; 30 L. J. C. 935; *Lambe v. Eames*, L. R. 6 Ch. Ap. 597; *Burt v. Hellyar*, 41 L. J. C. 430; L. R. 14 Eq. 160, 164.

(c) Lit. s. 56.

Estate for life of tenant,—*pur autre vie*.

For several
lives.

For joint lives.

For lives of
tenant himself
and others.

An estate may be limited for the lives of several persons named in the grant or lease, to continue until the death of the survivor.—An estate limited for the *joint* lives of several persons continues only until the death of him who dies first (a).

An estate may be limited for the lives of the tenant himself and of another or others, and is then, in respect of the other life or lives, an estate *pur autre vie*. Coke specifies this as a third branch, in addition to the two branches into which Littleton, as above, divides tenant for life, viz., into tenant for term of his own life and into tenant for term of another man's life. "To this," he says, "may be added a third, viz., into an estate both for term of his own life, and for term of another man's life. As if a lease be made to A. to have to him for term of his own life and the lives of B. and C., for the lessee in this case hath but one freehold, which hath this limitation, during his own life and during the lives of two others. And herein is a diversity to be observed between several estates in several degrees, and one estate with several limitations. For, in the first, an estate for a man's own life is higher than for another man's life, but in the second it is not" (b).

Doctrine that
estate for a
person's own life
is greater than
for life of
another.

According to the technical doctrine here referred to, that as between several estates an estate for a man's own life is higher than for another man's life, an estate *pur autre vie* is extinguished or merged by surrender to a tenant for his own life; so a lease to a person for the life of another with remainder to the same person for his own life operates to merge the prior limitation, and is a lease for his own life only and not for several lives (c). But this doctrine, as Coke says above, does not prevent the creation of *one* estate in a person with the several connected limitations, *both* for his own life and the lives

(a) See *Brudnell's Case*, 5 Co.
9 a.

(b) Co. Lit. 41 b.

(c) 11 Co. 83 b, *Bowles' Case*;
and see *post*, Part IV. Chap. IV.
'Merger.'

of others; and if he dies before the other persons on whose lives the estate depends, the estate continues, as in the ordinary case of an estate *pur autre vie* (a).

A grant or lease of land at common law, in a form sufficient to pass a freehold estate, made to a person without words of limitation, as "to A." or "to A. for ever," or "to A. and his assigns for ever," gives only an estate for life; the limitation "to his heirs" being necessary to make an estate of inheritance (b). A limitation in the above terms may be followed by a limitation of the remainder to B., or to B. and his heirs; and if there be no subsequent limitation, the reversion is left in the grantor (c).

If "A., tenant in fee simple, makes a lease of lands to B. to have and to hold to B. for term of life, without mentioning for whose life it shall be, it shall be deemed for term of the life of the lessee, for it shall be taken most strongly against the lessor, and, as hath been said, an estate for a man's own life is higher than for the life of another. But if tenant in tail make such a lease without expressing for whose life, this shall be taken but for the life of the lessor; for when the construction of any act is left to the law, the law will never so construe it as to work a wrong"; and tenant in tail cannot lawfully make a lease beyond the term of his own life, unless he

Limitation of estate for life—grant to A. without words of limitation.

Limitation for life without expressing for whose life.

By tenant in tail.

(a) *Rosse's Case*, supra; *Dale's Case*, Cro. Eliz. 182.

"For all other purposes," (than the application of the above technical doctrine,) "an estate given to A. for his own life and the lives of others (probably the very commonest form of all) was exactly the same as an estate given to him for the lives of others only. If in either case he died before the expiration of the term, the estate continued, and was liable, when no special occupant was named, to the singular common law incident of general occupancy and was capable

of that peculiar limitation known as special occupancy." *Per curiam*, *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192, 196; 41 L. J. C. 255; as to occupancy, see *post*, p. 193.

(b) See *ante*, p. 156; "If one (seised in fee) grant lands or tenements, reversions, remainders, rents, advowsons, commons, or the like, and express or limit no estate, the lessee or grantee (due ceremonies requisite by law being performed) hath an estate for life. The same law is of a declaration of a use." Co. Lit. 42 a, 183 a; Lit. s. 283.

(c) See *ante*, p. 40.

execute a disentailing assurance, under which he may dispose of the land for an estate in fee simple absolute or for any less estate (a).

By tenant for life.

For the like reason, "if tenant for life make a lease generally, this shall be taken by construction of law an estate for his own life that made the lease; for if it should be a lease for the life of the lessee, it should be a wrong to him in the reversion" (b).

Lease for several lives.

A lease to A. during the lives of B. and C. continues during the life of the survivor, without express limitation to that effect;—so a lease to A. and B. during their lives

For joint lives.

continues during the life of the survivor. And therefore an estate for *joint* lives must be expressly so limited (c).

Devise without words of limitation, under the Wills Act.

By the Wills Act, 1 Vict. c. 26, s. 28, which does not extend to any will made before 1st January, 1838, it is enacted "that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention appear by the will" (d).

In wills not under the Wills Act.

In wills made before 1st January, 1838, to which the above Act does not extend, a devise of land without words of limitation follows the rule of law for the construction of conveyances, and *primâ facie* creates an estate for life only. But in wills various modes of expressing the intention are allowed to supply the want of technical words of limitation, and to extend the devise to an estate of inheritance, according to certain rules of construction,

(a) Co. Lit. 42 a, 183 a; see *ante*, p. 39.

(b) Co. Lit. 183 a; "It is a maxim in law, that every man's grant shall be taken by construction of law most forcible against himself. *Qualibet concessio fortissime contra donatorem interpretanda est*;

which is so to be understood that no wrong be thereby done; for it is another maxim in law, *quod legis constructio non facit injuriam*." *Ib.*

(c) 5 Co. 9 a, *Brudnel's Case*.

(d) See *ante*, p. 163.

which have been already noticed in treating of devises in fee simple (a).

If a devise be made, after the death of A., to B. who is the heir at law of the testator, and the estate until the death of A. is not disposed of by residuary devise or otherwise, A. takes an estate for life by implication; such implication being necessary to effectuate the devise to the heir in the manner expressed, that is, not until the death of A. But a devise, after the death of A., to B., if B. be not the testator's heir, raises no such implication (b).

Devise for life
by implication.

A term created *pur autre vie* may continue beyond the life of the tenant himself by reason of his dying before the person or persons on whose life or lives the term depends; and if the term be limited to him for his own life only, and no provision be made in the limitation of it for the destination of the land in the event of the term continuing beyond his life, it was deemed at the common law to be vacant, and he who first entered became entitled to hold the land, as tenant under the lease, for the residue of the term. Such tenant was called an *occupant*, because his title was by his first occupation (c).

Occupancy of
estate *pur autre*
vie.

An occupancy may be prevented by an express limitation covering the vacancy. As by limiting the estate to the tenant, and "to his heirs" during the life of the

Limitation to
special occupant,
—to the heirs.

(a) See *ante*, p. 164.

(b) I Jarman, 465, where see the doctrine followed out in detail. The same implication arises upon a devise to the residuary devisee after the death of A. Ib. 474; and see Hawkins, 178; see the like implication of an estate tail, *ante*, p. 182.

(c) "If the lessee dieth living *cestui que vie*, (that is, he for whose life the lease was made,) he that first entereth shall hold the land during that other man's life, and he that so entereth is tenant *pur autre vie*, and shall be punished for waste as tenant *pur autre vie* and subject to the payment of the rent reserved,

and is in law called an occupant (*occupans*), because his title is by his first occupation. And so if tenant for his own life grant over his estate to another, if the grantee dieth, there shall be an occupant." Co. Lit. 41 b. "There can be no occupant of anything lying in grant;" Ib. Such things being incapable of possession, see *ante*, p. 52; but there may be a special occupant of such things by designation in the grant or under the statute providing against occupancy. Co. Lit. 388 a; as of a rent charge, *Bearpark v. Hutchinson*, 7 Bing. 178.

cestui que vie, in which case it is heritable while it lasts, like an estate in fee simple. An estate so limited has been called a *descendible freehold* (a). A devise to trustees and their heirs is sometimes impliedly restricted to a descendible freehold *pur autre vie*, by reason of the trust being restricted to the life (b).

To the heirs of
the body.

To executor or
administrator.

It may also be limited, like an estate tail, "to the heirs of his body;" it is then heritable by the issue, and is called a *quasi* entail (c).—It may also be limited to the tenant and his "executors or administrators," and it then devolves upon the personal representative (d).—The heir or representative thus taking by the terms of the limitation is called a *special* occupant, as being the occupant specially designated.

The case of general occupancy, where there is no limitation to a special occupant, is now supplied by statute. By the Wills Act, 1 Vict. c. 26, (repealing but substantially re-enacting the statutes 29 Car. II. c. 3, s. 12, and 14 Geo. II. c. 20, which previously enacted to nearly the same effect,) the general power of disposition by will thereby given is expressly extended "to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof" (section 3).—And it is enacted by section 6, "that in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal heredita-

(a) Co. Lit. 41 b; Lit. s. 739; 10 Co. 98 a, *Seymour's Case*; improperly so called, see *per* Kenyon, C. J. *Doe v. Luxton*, 6 T. R. 291; *per* Eldon, L. C. *Ripley v. Waterworth*, 7 Ves. 437. Coke observes—"It were good to prevent the uncertainty of the estate of the occupant to add these words (to have and to hold to him and his heirs during the life of the *cestui que vie*), and this shall prevent the *occupant*, and yet the lessee may assign it to whom he

will; or if he hath already an estate for another man's life without these words, then it were good for him to assign his estate to divers men and their heirs during the life of the *cestui que vie*." Co. Lit. 41 b.

(b) *Baker v. Parson*, 42 L. J. C. 228; see *ante*, p. 167.

(c) *Low v. Burron*, 3 P. Wms. 262; *Fearne*, C. R. 495.

(d) See *Atkinson v. Baker*, 4 T. R. 229; *Ripley v. Waterworth*, 7 Ves. 448.

ment, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate" (a).

This enactment applies to equitable estates *pur autre vie*, notwithstanding the legal estate be vested in trustees and their heirs (b).—An estate for the lives of the lessee and others is an estate *pur autre vie* within the statute (c).—The estate passing to the executor or administrator by special occupancy or under the Act, being made assets applicable in the same manner as personal estate, is thereby rendered liable to legacy duty, but is not made personal estate for the purpose of following the person and domicile of the deceased tenant; it is immovable property as regards jurisdiction, notwithstanding his domicile be foreign (d).

There could be no general occupant of a copyhold or customary tenancy; because the freehold title remaining in the lord precluded a vacancy, and the lord became *de facto* occupant (e).

But a special occupant may be expressly designated in the grant or surrender, to the exclusion of the occupancy of the lord; as by extending the estate "to the heirs."—And by special custom, in the absence of limitation, the heir or devisee or the *cestui que vie* may be entitled as special occupant (f).

(a) As to this enactment, see Burton on Real Property, (735); *Doe v. Lewis*, 9 M. & W. 662; *Ripley v. Waterworth*, 7 Ves. 425.

(b) *Reynolds v. Wright*, 25 Beav. 100; 30 L. J. C. 381.

(c) *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192; 41 L. J. C. 155.

(d) *Chatfield v. Berchtoldt*, *supra*.

(e) Hargrave's note (2) to Co. Lit. 59 b; *Zouch v. Forse*, 7 East, 186; *Doe v. Scott*, 4 B & C. 706.

(f) Scriven on Cop. 51; *Doe v. Martin*, 2 W. Bl. 1148; *Right v. Bawden*, 3 East, 260; *Doe v. Goddard*, 1 B. & C. 522; *Doe v. Scott. supra*; see *Jeans v. Cook*, 27 L. J.

By statute.

The statute 1 Vict. c. 26, s. 6, is expressly extended to lands of customary and copyhold tenure, and under that statute, if there be no special occupant, the estate will go to the executor or administrator of the tenant to be applied and distributed as personal estate (*a*). The former statutes of 29 Car. II and 14 Geo. II, for which the above statute was substituted were construed not to extend to copyholds; because by so extending them they would have prejudiced the rights of the lord (*b*). The special occupant by custom or under the statute must be admitted and pay a fine (*c*).

Discovery of the deaths of persons on whose lives estates depend.

In order to prevent frauds by the concealment of the deaths of persons on whose lives estates depend, a statute 6 Anne, c. 18, provides that a person claiming a remainder, reversion, or expectancy, after the death of any person may obtain an order of the Court of Chancery for the production of such person, and upon failure to produce such person, may enter upon the land as if such person were dead (*d*).

Presumption of death.

Proof that a person has been absent and not heard of for seven years raises a presumption of his death, but no presumption as to the time of his death. The ordinary presumption of life continues in the absence of any evidence respecting it (*e*).

C. 202, where the *cestuis que vie* were held to be entitled by the custom in succession for life estates.

(*a*) See *ante*, p. 194.

(*b*) *Zouch v. Forse*, 7 East, 186; see *ante*, p. 78.

(*c*) Co. Cop. s. 56; Scriven, 351.

(*d*) See 2 Blackst. Com. 177; and see 18 & 19 Car. II. c. 11, in the

Statutes, revised ed.

(*e*) Taylor on Evidence, 198, 5th ed.; see *Phenê's Trusts*, L. R. 5 Ch. 139; *Lewes' Trusts*, L. R. 6 Ch. 356; *re Walker*, L. R. 7 Ch. 120; i. g. *Nicholls*, 41 L. J. Prob. 88; *Beasney's Trusts*, 38 L. J. C. 159; *R. v. Lumley*, L. R. C. C. 196.

SECTION IV. ESTATES FOR YEARS.

Estate for years—"term"—"lease"—requisites of lease—parol lease.

Limitation of term, as to duration—certainty required—lease for successive periods—lease "from year to year"—notice to determine—implied tenancies from year to year.

Limitation of term, to A. and to his executors—to A. and to his heirs—to A. and to the heirs of his body.

Lease with covenant for renewal—covenant runs with the land—condition of observing covenants, etc., in the lease.

Chattel interests of uncertain duration.

An estate for years is an estate limited by a certain Estate for years. term or duration of time. An estate for a term of half a year, or for a quarter of a year, or for a smaller portion of a year, as being for a term certain in time, is classed in law with an estate for a term of years, and is subject, in general, to the like rules and incidents (a).

The word "term" may be used to signify not only "Term," the limits of time, but also the estate and interest that passes for that time; and it is a question of construction in which sense the word is to be understood (b).

The grant of an estate for years is commonly called a "Lease." lease or demise, the words "grant," "demise," and "let," being commonly used, though any words expressing the intention to transfer the possession for a certain time are sufficient (c).

(a) Lit. ss. 58, 67; Co. Lit. 54 b. A tenant from week to week or for any less time than a year is not a "tenant for any term of years" within the statute 4 Geo. II. c. 28, s. 1, which gives an action for double value against such tenant holding over after the determination of the term. *Lloyd v. Rosbee*, 2 Camp. 453; see *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(b) Co. Lit. 45 b; *Rector of Chedington's case*, 1 Co. 153 a;

Wright v. Cartwright, 1 Burr. 282, 284. "The word *term* referred to time has the same meaning with certainty—wherefore such a limitation of years as hath certainty in it may well be called a *term*, and a lease containing such time shall be good." Plowden, 273.

(c) Co. Lit. 45 b; Bacon's Abr. Lease, (K); Shepp. Touch. by Preston, 272; see *Doe v. Day*, 2 Q. B. 147, 152.

Meaning of lease, grant, etc. The term "lease" is applied also to the grant of an estate for life. The term "grant" is a general term, though used also in a special sense as applying to estates and rights in land which *lie in grant* in contrast to those which *lie in livery*. The term "feoffment" was used generally to denote a transfer of the seisin or immediate freehold estate; but it was applied also in a special sense to a transfer for an estate in fee simple; and the term "gift" to an estate in fee tail;—the corresponding terms applied to the parties being *feoffor* and *feoffee*,—*donor* and *donee*,—*lessor* and *lessee* (a).

Leases required to be in writing. All leases (excepting leases not exceeding three years from the making and at a rent of two-thirds at least of the value) are required by the Statute of Frauds (29 Car. II. c. 3, s 1, 2) to be in writing; and by the statute 8 & 9 Vict. c. 106, s. 3, (with the same exception,) they must be by deed.—An instrument which is void as a lease by reason of not being in the form of a deed may operate as an agreement for a lease, if capable of that construction, both at law and in equity (b).

By deed. Parol lease. A parol lease within the above exception, when perfected as an estate by the entry of the lessee, is valid as a lease, and imparts all the rights and remedies incident to such lease, notwithstanding the 4th section of the above Statute of Frauds, which requires a contract or sale of any interest in or concerning land to be in writing duly signed; but as a mere contract giving an *interesse termini* only, if the lessee refuses to effectuate it by entry, no action can be brought upon it (c).

(a) Lit. s. 57; see *ante*, pp. 46, 53; Shepp. Touch. 228.

(b) See *ante*, p. 49; *post* Part IV. Chap. I. 'Conveyances'; see *Parker v. Taswell*, 2 D. G. & J. 559; 27 L. J. C. 812; *Bond v. Rosling*, 1 B. & S. 371; 30 L. J. Q. B. 227; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J. Ex. 96; *Tidey v. Mollett*, 16 C. B. N. S. 298; 33 L. J. C. P. 235, *per* Erle, C. J.

(c) *Strafford v. Edge*, 1 C. & J. 391; see *ante* p. 44. As to what are contracts relating to an interest in land within the Statute of Frauds, see Leake on Contracts, p. 131. The following cases may be noticed as connected with the subject of tenancies.—A contract for the exclusive possession of a specific part of a house or premises, as the ordinary contract for lodgings, is within the

The term may be limited, as to duration, by a certain time either in express terms or by reference,—“For regularly in every lease for years the term must have a certain beginning and a certain end—yet if by reference to a certainty it may be made certain it sufficeth, *quia id certum est quod certum reddi potest*. For example, if A. leaseth his land to B. for so many years as B. hath in the manor of *Dale*, and B. hath then a term in the manor of *Dale* for ten years, this is a good lease by A. to B. of the land of A. for ten years.”—“So, if a lease be made to another during the minority of J. G., and he is of the age of ten years, now this is a good lease for eleven years, if J. G. shall as long live” (a). Limitation of term, as to duration.

“It is here to be understood that the years must be certain, when the lease is to take effect in interest or possession. For before it takes effect in interest or possession, it may depend upon an uncertainty.”—“For example, if A. seised of land in fee grant to B. that when B. pays to A. twenty shillings, from thenceforth he shall have the land for twenty-one years, and after B. pays the twenty shillings, this is a good lease for twenty-one years from thenceforth.”—So, “if a man maketh a lease to J. S. for so many years as J. N. shall name, this at the beginning is uncertain; but when J. N. hath named the years, then it is a good lease for so many years (b). Certainty required.

4th section of the Statute of Frauds, and unless validated as a parol lease under the 2nd section, must be evidenced by writing signed. *Stratford v. Edge*, *supra*. But a contract for mere permission to reside or use premises, or a specific part of premises, not involving the exclusive possession, as a contract for board and lodging in the house of another, is not within the 4th section. *Wright v. Stavert*, 2 E. & E. 721; 29 L. J. Q. B. 161. In the latter case the landlord retains the legal possession, and the person entitled under such contract cannot main-

tain an action of trespass or any action depending on possession. *Ib.* As to what constitutes a tenancy or occupation for the purpose of rating, see *R. v. Smith*, 3 E. & E. 383; 30 L. J. M. 74; see *Roads v. Trumington*, L. R. 6 Q. B. 56; 40 L. J. M. 35; *R. v. St. George's Union*, 41 L. J. M. 30; *Allan v. Liverpool*, L. R. 9 Q. B. 180; 43 L. J. M. 69.

(a) Co. Lit. 45 b; 6 Co. 35 b, *Bishop of Bath's Case*; 3 Co. 19 b, *Boraston's Case*; Plowden, 273, *Say v. Smith*; Plowden, 520.

(b) Co. Lit. 45 b; 6 Co. 35 b, *Bishop of Bath's Case*, and it seems

A lease for so many years as a person may live is a freehold estate by reason of the uncertainty of the term (a). But if "a man maketh a lease for twenty-one years if J. S. live so long, this is a good lease for years, and yet is certain in uncertainty"; it has a certain limit notwithstanding the uncertainty of reaching it (b).

A lease may be limited to continue for successive periods at the option of one or other of the parties:—
as for a term of 7, 14, or 21 years, which continues for those successive periods, unless the option to determine it at the end of one of the periods is duly exercised; and such option rests presumptively with the lessee, if no intention to the contrary be expressed (c).

Lease for successive terms,—7, 14, or 21 years.

Lease "from year to year."

A lease "from year to year" is a term for one year certain, continuing for successive years, unless due notice have been given to determine it at the end of the first or any subsequent year (d). A lease "for one year, and so on from year to year," is a term for two years certain, continuing for successive years, unless due notice have been given to determine it (e).

Notice required to determine tenancy.

The notice required by law to determine a tenancy from year to year, in the absence of agreement to the contrary, must be given half a year before the expiration of the current year of the tenancy (f); and a tenancy from year to year is determinable by either party giving the proper notice (g). Where the term is determined

that if the number of years be named after the commencement of the lease (in the life of the lessor), the lease will be made good *ex post facto*. *Ib.*

(a) Co. Lit. 42 a, 45 b; and see Plowden, 522.

(b) Co. Lit. 45 b. This is a term of years with a *conditional limitation*, as to which, see *post*, p. 220.

(c) *Doe v. Dixon*, 9 East, 15; *Dann v. Spurrier*, 3 B. & P. 399; see *Powell v. Smith*, L. R. 14 Eq. 85; 41 L. J. C. 734.

(d) *Doe v. Smaridge*, 7 Q. B. 957.

(e) *Denn v. Cartwright*, 4 East, 29; *Johnstone v. Hudlestone*, 4 B. & C. 922; *Doe v. Green*, 9 A. & E. 658.

(f) Butler's note (1) to Co. Lit. 270 b; *Right v. Darby*, 1 T. R. 159; *Doe v. Dobell*, 1 Q. B. 806; see *Bridges v. Potts*, 17 C. B. N. S. 314; 33 L. J. C. P. 338; as to the service of notice, see *Tanham v. Nicholson*, L. R. 5 H. L. 561.

(g) *Doe v. Browne*, 8 East, 165; see S. C. 14 Ves. 156; *King's Leaseholds*, L. R. 16 Eq. 521; see *post*, p. 206.

by force of an express limitation, the lease itself supplies sufficient notice; both parties are equally apprised of the determination of the term, and no further notice is required (a).

A general letting, without express limitation of the term, at a fixed yearly rent, though it be payable half-yearly or quarterly, impliedly creates a term or tenancy from year to year (b);—and the payment of such a rent in respect of a tenancy, is *prima facie* evidence of a tenancy from year to year, with the usual incidents of such a tenancy (c).

A tenancy from year to year is, in general, implied from the payment and acceptance of a yearly rent under an agreement for a lease not amounting to an actual demise (d); but mere occupation, without payment of the rent, will not raise the same implication (e).—A tenancy from year to year would also be implied from the payment of rent by the tenant in respect of a continued occupation after the expiration of a lease (f); but a continued occupation or holding over alone is not sufficient to imply a tenancy (g).

The tenancy thus implied will include all the terms of the agreement or previous lease which are applicable to such a tenancy, as conditions of re-entry, stipulations as to notice, etc. (h):—thus, it will expire without notice at the end of the term limited in the agreement (i); and

(a) *Right v. Darby*, supra.

(b) *Richardson v. Langridge*, 4 Taunt. 128, 131; *Doe v. Wood*, 14 M. & W. 682, 687.

(c) *Doe v. Watts*, 7 T. R. 83; *Doe v. Crago*, 6 C. B. 90, 98.

(d) *Knight v. Bennett*, 3 Bing. 361; *Cox v. Bent*, 5 Bing. 185; *Chapman v. Towner*, 6 M. & W. 100; *Braythwaite v. Hitchcock*, 10 M. & W. 494.

(e) *Waring v. King*, 8 M. & W. 571; *Anderson v. Midland Ry. Co.* 3 E. & E. 614; 30 L. J. Q. B. 94; see 'Tenancy at will,' *post*, p. 208.

(f) *Doe v. Weller*, 7 T. R. 478; *Bishop v. Howard*, 2 B. & C. 100; *Doe v. Dobell*, 1 Q. B. 806; see *Buckworth v. Simpson*, 1 C. M. & R. 834.

(g) 8 M. & W. 575, *Waring v. King*; as to the remedies of the landlord in such case, see 4 Geo. II. c. 28, s. 1, Bullen & L. Prec. Pl. 215.

(h) *Doe v. Powell*, 5 B. & C. 312; *Doe v. Amey*, 12 A. & E. 476; *Doe v. Bell*, 5 T. R. 471.

(i) *Tress v. Savage*, 4 E. & B. 36; 23 L. J. Q. B. 339.

Implied tenancies from year to year,—from a general letting at fixed rent.

From payment of rent.

Under an agreement for a lease.

After expiration of a lease.

Terms of implied tenancy from year to year.

a stipulation that the tenant shall paint in the last year of the term limited will apply, if the tenancy so long continues (a).—The same implications will arise from an agreement or lease, although it be void, as such, by reason of not satisfying the requirements of the Statute of Frauds, or not being under seal as required by the statute 8 & 9 Vict. c. 106, s. 3 (b).

Express terms
exclude implica-
tion.

An express stipulation to a different effect excludes the implication of a tenancy from year to year, as where it is expressly agreed that the tenancy shall be determinable at will (c).—"So long as both parties shall please" is, it seems, consistent with a tenancy from year to year (d).

Limitation of
term,—to A. and
to his executors.

A lease for years is sometimes limited in the form "to A. and to his executors and administrators," in analogy with the limitation of an estate of inheritance "to A. and to his heirs." But the additional words of limitation in this case are quite superfluous; they merely denote the rule of law respecting the devolution of the term, as personal estate, which would apply without the addition of those words (e). If a lease be made to a person for life, with remainder to his executors for a term of years, the term of years rests in the lessee himself as well as if it had been limited to him and to his executors (f).

To A. and to his
heirs.

If a lease be made to a man and "to his heirs" for a term of years, it will pass as personal estate, to the executor of the lessee and not to the heir; the limitation

(a) *Martin v. Smith*, L. R. 9 Ex. 50; 43 L. J. Ex. 42.

(b) See *ante*, p. 198; *Doe v. Bell*, 5 T. R. 471; *Clayton v. Blakey*, 8 T. R. 3; *Martin v. Smith*, *supra*.

(c) *Richardson v. Langridge*, 4 Taunt. 128; *Doe v. Cox*, 11 Q. B. 122; *Pinkhorn v. Sonster*, 8 Ex. 763; *Morton v. Woods*, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81.

(d) *Doe v. Cox*, *supra*, *per* Coleridge, J.; *Doe v. Davies*, 7 Ex. 89;

see *Hastings Union v. St. James, Clerkenwell*, L. R. 1 Q. B. 38; 35, L. J. M. 65.

(e) *Ante*, p. 33, 45; Shepp. Touch. by Preston, 76.

(f) Co. Lit. 54 b, by analogy with the rule in *Shelley's Case*; see *post*, Chap. II. Sect. 1; see 1 Sugden on Powers, 80, 7th ed.; *Webb v. Sadler*, 42 L. J. C. 498; L. R. 8 Ch. 419.

to the heirs, being wholly inapplicable to personal estate, is rejected (a).

If a lease be made to a man and "to the heirs of his body" for a term of years (or in any other terms which expressly or impliedly would raise an estate tail in the inheritance), the whole term vests absolutely in the immediate donee in tail (b).—And it is the same with bequests by will: "where personal estate (including terms of years of whatever duration) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and consequently devolves at his death to his personal representative and not to his heir in tail" (c).

A term of years may be attended with the right of renewal by virtue of a covenant inserted in the lease to that effect.—A covenant to renew a lease, with all the covenants and articles contained in it, does not import that the renewed lease shall contain a covenant for renewal; but the covenant may in express terms give the right of perpetual renewal of successive leases (d).—A covenant for renewal runs with the land in favour of assignees of the lease, and against grantees of the reversion (e).

(a) Lit. s. 740; Co. Lit. 46 b; Shepp. Touch. by Preston, 76.

(b) Fearn, C. R. 461; Will. Ex. 565 (d); and see *Lovies's Case*, 10 Co. 87 b, there commented upon; *Brouncker v. Bagot*, 1 Mer. 271; *Lord Verulam v. Bathurst*, 13 Sim. 374. "A term or personal estate cannot be entailed; for where a term or other personal estate is limited to one in tail, it is an absolute and complete disposition of the whole term to him and his executors; he may dispose of it as he pleases; if he does not dispose of it it goes to his executors and not to his issue; and it does not revert for

default of issue." Fearn, C. R. *supra*.

(c) 2 Jarman on Wills, 489, and see the cases there cited.

(d) *Iggulden v. May*, 7 East, 237; 2 B. & P. N. R. 449; 9 Ves. 325; *Hare v. Burges*, 4 K. & J. 45; 27 L. J. C. 86.

(e) *Shelburne v. Biddulph*, 6 Bro. P. C. 363; 1 B. & Ald. 11, *Vernon v. Smith*; 12 East, 469, *Roe v. Hayley*; *Simpson v. Clayton*, 4 Bing. N. C. 758, 780. As to covenants running with the land, see Leake on Contracts, ch. vi. s. 2. As to the renewal of a lease by a trustee, see *ante*, p. 151.

Renewal
conditional upon
observance of
covenant .

The covenant for renewal may be expressed to be conditional upon the observance by the lessee of all his covenants in the lease, and then by breach of the covenants his right of renewal will be forfeited. Equity will not relieve the lessee in such case; nor will equity relieve the lessee in case of neglect to renew within the appointed time, unless caused by fraud of the lessor, or unavoidable accident, or ignorance (a).

Chattel interests
of uncertain
duration.

Some estates, the duration of which is measured by the raising of money or by the satisfaction of debts out of the profits of the land, although uncertain in duration, yet being of the nature of chattel interests, in that respect, may be classed with estates for years.—“As if a man devise land to his executors for payment of his debts, and until his debts be paid; in this case the executors have but a chattel,—for if they should have it for their lives, then by their death their estate should cease, and the debts unpaid; but being a chattel, it shall go to the executors of executors for the payment of the debts” (b).—So, a devise to trustees without words of limitation, to pay debts or legacies or to raise a sum of money for portions or the like, in wills made before 1st January, 1838 (to which the Wills Act does not extend), might be construed to pass an indefinite term or chattel interest only (c).

Devise for pay-
ment of debts.
To executors.

To trustees.

Devise to trustee
or executor
under the Wills
Act.

But now by the Wills Act, 1 Vict. c. 26, s. 30, applying to wills made on or after 1st January, 1838, it is enacted “that where any real estate shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest

(a) *Harries v. Bryant*, 4 Russ. 89; *Job v. Banister*, 2 K. & J. 374; 26 L. J. C. 125.

(b) Co. Lit. 42 a; see *Corbet's Case*, 4 Co. 81 b; 8 Co. 96 a, *Manning's Case*, where Coke adds, “If such an estate be made by grant or conveyance at common law, the law

will adjudge it an estate of freehold.” *Ib.*

(c) 2 Jarman on Wills, 218; Hawkins on Wills, 148; see 1 P. Wms. 509, 518, *Carter v. Barnardiston*; 1 Eden, 119, 123, *Wright v. Pearson*.

which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication'' (a).

A grant of a rent out of land with a clause entitling the grantee, if the rent be in arrear, to enter or take the profits until the arrears be satisfied, gives, upon entry, a chattel interest, though of uncertain duration (b). Right of entry for arrears of rent.

Tenant by *elegit* holds the land until the debt is satisfied, and has a chattel interest and no freehold (c). Tenant by *elegit*.

So, in former times when such securities were in use, the estates of tenant by *statute merchant* and tenant by *statute staple* were considered merely as chattel interests. Tenant by statute merchant and statute staple. These from their uncertain nature ought to have been considered as freehold; but being a security provided for personal debts, to which the executor is entitled, the law thus directed their succession, that the security should be vested in him to whom the debts, if recovered, would belong (d).

(a) See *ante*, p. 167; 2 Jarman, 229.

(b) *Jemott v. Cowley*, 1 Wms. Saund. 112 c; 1 Lev. 170.

(c) Co. Lit. 42 a, 43 b; 4 Co. 82 a,

Corbet's Case. See *post*, Part IV. Chap. VII. 'Legal Process.'

(d) Butler's note to Co. Lit. 208 b; 2 Blackst. Com. 162.

SECTION V. TENANCY AT WILL.

Tenancy at will—of both lessor and lessee—of lessee only—creates no tenure or reversion.

Creation of tenancy at will—with reservation of rent—possession of *cestui que trust*—possession under agreement to purchase—customary tenancy at will.

Determination of tenancy at will—by the lessor—by the lessee—by death of lessor or lessee—under the statute of limitations.

Tenancy at sufferance—distinction between tenancy at sufferance and at will.

Statutory remedies against tenants holding over.

Tenancy at will. A tenancy at will is where a person is in possession of land let to him to hold at the will of the lessor. “In this case the lessee is called tenant at will, because he has no certain nor sure estate, for the lessor may put him out at what time it pleaseth him” (a).

Of both lessor and lessee.

“It is regularly true, that every lease at will must in law be at the will of both parties, and therefore when the lease is made to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be only at the will of the lessor, but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the books that seem *primâ facie* to differ, clearly reconciled” (b).

(a) Lit. s. 68; “A tenant at will is he who enters and enjoys the land by the express or implied consent of the owner, without there being any obligation on the part either of the lessor or lessee to continue it for any certain or determinate term.” Butler’s note to Co. Lit. 270 b.

(b) Co. Lit. 55 a; see the cases

in the note to *Davis v. Waddington*, 7 M. & G. 37, 45 n (a); and in 2 Hayes Conv. 39–41, note, (40), 5th ed.; 7 Ex. 92, *Doe v. Davies*. But as to the lease at the will of the lessee last mentioned, Coke must be understood as meaning a lease without livery or other sufficient conveyance of a freehold estate.

A lease or grant purporting to limit the estate to hold Of lessee only. at the will of the lessee *only*, that is, for so long a time as the lessee pleases to continue tenant, is a freehold or estate for life determinable at the will of the lessee (a); and formerly livery of seisin was necessary to convey such estate, as now it requires a deed (b). But it seems that a grant for an uncertain duration cannot be a freehold or estate for life, if it be made determinable at the will of the grantor (c).

A tenancy at will creates no tenure; "for tenant at will shall not do fealty, when he hath no certain estate, but may be put out at the pleasure of the lessor, or he himself may determine it at his pleasure."—"But otherwise it is of a copyholder or tenant at will according to the custom of the manor, for that he is bound to do fealty; and the reason is because there is a tenure" (d). Tenancy at will creates no tenure.

Accordingly, the estate of the lessor, not being rever- No reversion. sionary, lay in livery only, and not in grant, so long as that distinction prevailed (e). Hence, also, rent reserved Or rent service. upon a tenancy at will, though distrainable of common right, is not rent service (f).

A general letting without limitation of a term, (not

(a) *Doe v. Browne*, 8 East, 165; *Brown v. Warner*, 14 Ves. 156; *Beeson v. Burton*, 12 C. B. 647; 22 L. J. C. P. 33; see *King's Leaseholds*, L. R. 16 Eq. 521.

(b) See *ante* p. 46, 51; *Doe v. Browne*, *supra*; "If a man grant an estate for any uncertain time, *tempus indeterminatum*, if it be of lands and tenements, the lessee hath in judgment of law an estate for life determinable, if livery be made; and if it be of rents or any other things that lie in grant, he hath a like estate for life by the delivery of the deed." Co. Lit. 42 a; see *ante* p. 191; *post*, p. 220.

(c) *Fernie v. Scott*, L. R. 7 C. P. 202; 41 L. J. C. P. 20.

(d) Lit. s. 132; Co. Lit. 63 a, 93 b; *ante* p. 26; "And the doing of fealty by a copyholder proveth that a copyholder so long as he observes the custom of the manor and payeth his services hath a fixed estate." Co. Lit. 63 a; *ante* p. 71.

(e) See *ante*, p. 53; 1 Roll. Abr. 292 a, pl. 9; a feoffment was *ipso facto* a determination of the will. *Ball v. Cullimore*, 2 C. M. & R. 120; *post*, p. 209; the lessor might convey to the lessee by release, by reason of the privity between them and the possession already in the tenant. *ante*, p. 55; Lit. s. 460; *post*, Part IV. Chap. I. 'Release.'

(f) Lit. s. 72; Co. Lit. 57 b, 142 b; see *ante*, p. 24.

Creation of
tenancy at will.

being in a form to pass a freehold estate,) or a mere permission to enter and occupy creates a tenancy at will, unless there be conditions or circumstances from which a tenancy from year to year may be implied, as a payment of rent by the year, or quarter, or some other part of the year, or unless there be some prior agreement to which the letting may be referred (a).

Tenancy at will
with rent re-
served.

A tenancy at will may be made by express agreement to that effect, notwithstanding a reservation of rent payable yearly, or at other fixed periods; the express limitation rebuts the implication of a tenancy from year to year which might arise from the reservation or payment of the periodical rent (b).

The mere fact of possession or occupation without any permission or acquiescence of the landlord does not alone create a tenancy at will, for the agreement of both parties is necessary to a tenancy; it is said, however, that slight evidence would be sufficient to infer that an occupation is by permission and not adverse (c).

Possession of
cestui que trust.

According to the above principles a *cestui que trust* in possession of land with the consent of the trustee is regarded in law as in the position of tenant at will (d); and such was the legal position of a *cestui que use* before the Statute of Uses (e).

Possession under
agreement to
purchase.

Upon the same principles a purchaser of land let into possession by the vendor before completion of the convey-

(a) 14 M. & W. 687, *Doe v. Wood*; as to implied tenancies from year to year, see *ante*, p. 201; *Richardson v. Langridge*, 4 Taunt. 128, where a rent or compensation stipulated to be taken *de die in diem* was held to be no foundation for implying such tenancy; but it was there said that "the Courts have a great inclination to make every such tenancy a holding from year to year, if they can find any foundation for it."

(b) *Ante*, p. 202; *Richardson v. Langridge*, 4 Taunt. 128; *Doe v.*

Cox, 11 Q. B. 122; *Doe v. Davies*, 7 Ex. 89; *Anderson v. Midland Ry. Co.*, 30 L. J. Q. B. 94.

(c) *Doe v. Rock*, 4 M. & G. 30; *Doe v. Turner*, 7 M. & W. 226; 9 Ib. 643; *Ley v. Peter*, 3 H. & N. 101; 27 L. J. Ex. 239.

(d) *Ante*, p. 127; *Freeman v. Barnes*, 1 Vent. 55; *Doe v. Jones*, 10 B. & C. 718; *Doe v. M'Kaeg*, 1b. 721; *Garrard v. Turk*, 8 C. B. 231; 18 L. J. C. P. 338; see *Melling v. Leak*, 16 C. B. 652; 24 L. J. C. P. 187.

(e) Lit. ss. 462, 463; *ante*, p. 100.

ance, is regarded in law as in the position of a tenant at will to the vendor (*a*). In equity he is considered as owner according to the terms of the contract (*b*).

Under the law of freehold tenure, the possession of a customary tenant is regarded as a tenancy at will to the lord, though the will of the lord as to the duration of the tenancy is regulated by the custom; and the rights of possession and enjoyment incident to the tenancy, in the absence of special custom, are the possessory rights of tenants at will at common law (*c*).

The lessor may determine the tenancy at will expressly, by giving notice to the lessee to that effect (*d*),—or impliedly, by doing any acts of ownership inconsistent with the continuance of the tenancy; as entering and cutting down trees, or cutting and carrying away stone without the consent of the lessee (*e*). A feoffment with livery of seisin to another, though made in the absence of the tenant at will and without his knowledge, was held to be a determination of the tenancy at will; “it being a general rule of law that any act done upon the land by the lessor in assertion of his title to the possession determines the will, whether the tenant knows it or not” (*f*).—The lessor cannot maintain an action of

Customary
tenancy at will.

Determination
of tenancy at
will by lessor.

(*a*) Lit. s. 70; *Right v. Beard*, 13 East, 210; *Bull v. Cullimore*, 2 C. M. & R. 120; *per* Parke, B., *Doe v. Stanion*, 1 M. & W. 695, 700; *Doe v. Chamberlain*, 5 M. & W. 14; *Doe v. Edgar*, 2 Bing. N. C. 498; as to the possession given under a void conveyance, see *Hodgson v. Hooper*, 29 L. J. Q. B. 222, and cases there cited.

(*b*) *Ante*, p. 137; *post*, p. 302.

(*c*) See *ante*, p. 71, 86, 207; Lit. s. 82; *Keyse v. Powell*, 2 E. & B. 132; 22 L. J. Q. B. 305; *Bowser v. MacLean*, 2 D. F. & J. 415; 30 L. J. C. 273.

(*d*) Co. Lit. 55 *b*; see *Locke v. Matthews*, 13 C. B. N. S. 753; 32 L. J. C. P. 98; as to what notice is

sufficient, see *Ib.*; *Doe v. Price*, 9 Bing. 356; *Roe v. Street*, 2 A. & E. 329.

(*e*) Co. Lit. 55 *b*; *Doe v. Turner*, 7 M. & W. 226; 9 *Ib.* 643.

(*f*) *Bull v. Cullimore*, 2 C. M. & R. 120; see *per* Parke, B., in *Pinhorn v. Sonster*, 22 L. J. Ex. 268, 8 Ex. 763. According to Coke, “There is an express *ouster* and implied *ouster*: an express, as when the lessor cometh upon the land, and expressly forewarneth the lessee to occupy the ground no longer; an implied, as if the lessor without the consent of the lessee enter into the land and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in

ejectment without previously determining the tenancy, as by a demand of possession, though any mode of determining it would be sufficient (a).

Determination
by lessee.

The lessee may determine the tenancy at will by express notice and quitting possession ; but a mere notice without quitting possession would not be sufficient as against the lessor (b). Transfer of the possession to another with notice to the lessor is a determination of the tenancy, and operates as a disseisin of the lessor (c). "A tenant at will cannot as against the landlord to whom he is tenant constitute another person tenant at will ; but he can make a tenant at will as against himself" (d).—Any acts of ownership by the lessee inconsistent with the mere tenancy at will, as cutting down timber trees or voluntarily pulling down houses, may be treated, as against him, as a determination of the tenancy (e).

Determination
by death of
lessor or lessee.

A tenancy at will is determined by the death of the lessor or of the lessee (f). And though the lease be made to the lessee to hold to him and to his heirs at the will of the lessor, the words (to the heirs of the lessee) are void ; for by the death of the lessee the lease is absolutely determined, and if his heir enter he is a trespasser (g). But it is otherwise with a tenant at will

him. The lessor may by actual entry into the ground determine his will in the absence of the lessee, but by words spoken from the ground the will is not determined until the lessee hath notice." Co. Lit. 55 b, 245 b.

(a) *Denn v. Rawlins*, 10 East, 261 ; *Right v. Beard*, 13 East, 210.

(b) Hargrave's note (15) to Co. Lit. 55 b.

(c) Co. Lit. 57 a ; Hargrave's note (3), Ib. ; *Pinhorn v. Sonster*, 8 Ex. 763 ; 22 L. J. Ex. 266, where the Court laid down the principle "that a tenant at will cannot determine the tenancy at will without

either giving notice to the landlord or by transferring it to some other person with notice to the landlord."

(d) 9 Q. B. 865, *Doe v. Carter*.

(e) Co. Lit. 57 a.

(f) Co. Lit. 57 b, 62 b ; see *Doe v. Rock*, 4 M. & G. 30. But not by the death of one of joint lessors or lessees ; "If a lease be made by two to two others at will, and the one of the lessors or of the lessees die, the lease is not determined in neither of those cases." Co. Lit. 55 b ; 5 Co. 10 a, *Henstead's Case* ; see *post*, Part V. Chap. I. 'Joint Tenants.'

(g) Lit. s. 82 ; Co. Lit. 62 b.

according to the custom of a manor, who may have an estate of inheritance or any less estate by the custom (a).

Upon the determination of a tenancy at will by the lessor or by his death, the lessee retains the right to the emblements or annual crops which he has sown during the tenancy, with the right to enter upon the land to cut and carry them.—So, upon the death of the lessee, his executor has the same right; but if the lessee determine the tenancy by his own act, he has no such right (b). And upon the determination of the tenancy by the lessor, the lessee has an implied licence to enter for a reasonable time to remove his goods (c).

Right of tenant at will or his executor to take crops.

And to remove goods.

By the Act for the limitation of actions and suits relating to real property, 3 & 4 Will. IV. c. 27, s. 7, it is enacted,—“That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee.”

Determination of tenancy at will under the statute of limitations.

The right of entry for the purpose of limitation under the statute accrues ultimately at the end of a year from the commencement of the tenancy at will, though the tenancy continue and come to a subsequent determination for other purposes; and it may accrue at an earlier

(a) Lit. s. 82; Co. Lit. 63 a; see *ante*, p. 71, 79.

(b) Lit. s. 68; Co. Lit. 55 b, 56 a.

(c) Lit. s. 69; see *Doe v. M'Keag*, 10 B. & C. 721; *Cornish v. Stubbs* L. R. 5 C. P. 334; 29 L. J. C. P. 202.

determination of the tenancy (a). But the right of entry is renewed by a new tenancy at will created by agreement of the parties, express or implied, before the period of limitation for the original right has elapsed; and the period of limitation then recommences at the end of the year from the commencement of the new tenancy, or at its earlier determination (b). The proviso to the section extends only to express trusts, not to the constructive trust arising from a contract of sale; and a tenancy at will created by possession under such contract is within the enactment (c).

Tenancy at
sufferance.

“A tenant at sufferance is he that at first came in by lawful demise, and after his estate ended continueth in possession and wrongfully holdeth over. As where tenant *pur terme d'autre vie* continueth in possession after the decease of *cestui que vie*; or tenant for years holdeth over his term.” So, if tenant at will continueth in possession after the death of the lessor, or other determination of the term, he is tenant at sufferance (d).

“There is a diversity between a tenant at will and a

(a) *Day v. Day*, L. R. 3 P. C. 751; 40 L. J. P. C. 35; in *Doe v. Carter*, 9 Q. B. 867, Patteson, J. stated his opinion that the statute determined a tenancy at will at the end of one year after its commencement for all purposes, and doubted if there could be now a continuous tenancy at will, except as a new one every year.

(b) *Doe v. Turner*, 7 M. & W. 226, 9 Ib. 643; *Doe v. Carter*, supra; *Hodgson v. Hooper*, 29 L. J. Q. B. 222; *Locke v. Matthews*, 13 C. B. N. S. 753; 32 L. J. C. P. 98; *Day v. Day*, supra. “When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so

restored either by entering on the actual occupation of the property, or by receiving rent from the person in occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will.” Ib.

(c) *Doe v. Rock*, 4 M. & G. 30; see ante, p. 208.

(d) Co. Lit. 57 b; *Simkin v. Ashurst*, 1 C. M. & R. 261; *Doe v. Turner*, 7 M. & W. 226; 9 Ib. 643; see *Day v. Day*, L. R. 3 P. C. 751; 40 L. J. P. C. 35. A mortgagor who continues in possession after conveyance of the legal estate to the mortgagee, is at law in the position of tenant at sufferance, unless the mortgage deed provide to the contrary. See post, Sect. VII. ‘Mortgage,’ p. 290.

tenant at sufferance ; for tenant at will is always by right, and tenant at sufferance entereth by a lawful lease and holdeth over by wrong.”—“ The former is in by the consent of the owner of the lands ; this creates a privity between them. A tenant by sufferance is in only by the *laches* of the owner ; so that there is no privity between them” (a). The permission or acquiescence of the landlord would convert a tenancy at sufferance into a tenancy at will ; and slight evidence would be required for this purpose (b).—The landlord may rightfully enter or maintain an action of ejectment against a tenant at sufferance without any demand of possession ; but he cannot maintain trespass before making entry (c).

Distinction between tenant at sufferance and at will.

Remedies have been given by statute against tenants holding over, besides the ordinary remedies for the recovery of possession. By the statute 4 Geo. II. c. 28, s. 1, any tenant for term of life lives or years, or other person coming into possession under such tenant, who shall wilfully hold over after the determination of such term, and after demand made and notice in writing given for delivering the possession, is made liable to pay to the person kept out of possession double the yearly value of the lands for the time they are detained. And by the 11 Geo. II. c. 19, s. 18, any tenant who shall give notice to quit, and shall not accordingly deliver up possession at the time in such notice, is made liable to pay to the landlord double the rent during the time he shall continue in possession (d).

Remedies by statute against holding over,—double value

Double rent.

(a) Co. Lit. 57 b ; Butler’s note to Co. Lit. 270 b. Hence “ a release to a tenant at will is good, because between them there is a possession with a privity ; but a release to a tenant at sufferance is void because, he hath a possession without privity.” Co. Lit. 270 b ; see *post*, Part IV. Chap. I. ‘ Release.’

which the tenant is not entitled to the fruits of his own industry, as he has no right to emblements, would not be long continued.” *Doe v. Turner*, 7 M. & W. 226, 235.

(c) Co. Lit. 57 b ; *Thunder v. Belcher*, 3 East, 449 ; *Doe v. Quigley*, 2 Camp. 505 ; *Doe v. Day*, 2 Q. B. 147.

(b) See *ante*, p. 208 ; “ Slight evidence would probably satisfy a jury that a relation so inconvenient as that of a tenancy by sufferance, in

(d) As to these statutes and proceedings thereon, see Chitty’s Statutes ; Bullen & L. Prec. Pl. 3rd ed. 215, 216.

SECTION VI. CONDITIONAL LIMITATIONS AND CONDITIONS.

§ 1. Conditional limitations.

§ 2. Conditions.

§ 3. Construction and application of conditions.

Estates deter-
minable by con-
ditions.

Estates in fee simple, fee tail, for life and for years are distinguished, as above explained, by the limits prescribed for their duration, and they regularly determine upon attaining their respective limits, namely, failure of heirs or of issue, death of the person by whose life the estate is limited or lapse of years. They may, however, be subjected to conditions by force of which, without losing their distinctive character, they may be determinable without attaining their regular limits of duration. Estates thus made conditionally determinable form the subject of this section.

Estates arising
upon conditions.

Estates may also be limited to *arise* upon conditions; and according to their effect as giving rise to or determining the estate, conditions in general are distinguished as conditions *precedent* and conditions *subsequent* (a).

Conditions pre-
cedent.

But conditions precedent do not affect the limitation of the estate in respect of quantity or duration; they relate only to the time of commencement or vesting of the estate, and therefore belong to the second chapter of this part, which treats of the limitation of future estates. Conditions precedent giving rise to future estates occur in contingent remainders at common law, in limitations by way of springing and shifting uses, and in executory devises (b).

It may be observed that conditions precedent giving

(a) Co. Lit. 201 a; 1 Jarman on Wills, 796.

(b) See *ante*, p. 48, 113, 68; and see examples cited in 1 Jarman on

Wills, 797; as to the construction of words in making conditions precedent or subsequent, see *ib.* and at p. 804.

rise to future estates may operate indirectly as conditions subsequent relatively to the preceding estate by defeating it; upon the happening of the conditional event they displace the preceding estate, and are substituted for it. But they are not on that account brought within the scope of the present section, because they are altogether extraneous to the limitation of the preceding estate (*a*).

Those conditions only which enter into the limitation of the estate as to quantity or duration, and render it determinable, or *conditions subsequent*, have here to be considered. With respect to these it may be further incidentally observed that they may be annexed to future estates, vested or contingent; so that they may operate upon estates in remainder and determine them before they became vested in possession (*b*); and they may operate upon contingent estates before they become vested in interest (*c*).

The conditions subsequent, which are the subject of this section, appear in the two forms of *conditional limitations* and *conditions of re-entry*, or *conditions* strictly so called at common law, which forms of condition, as they differ essentially in their respective modes of operation, require to be treated separately.

A *conditional limitation* operates to determine the estate by the intrinsic force of the limitation; in the event prescribed by the terms of the condition the estate ceases. A *condition* operates by reserving a right of re-entry (or in some cases it may be some other mode of defeating the estate) to the grantor and his heirs; in

(*a*) The same limitation may however be capable of being construed with both aspects, and may then determine the preceding estate, even though it fail in effect to carry the estate over. See *Doe v. Eyre*, 5 C. B. 713; *Robinson v. Wood*, 27 L. J. C. 726. But see the observations of Kindersley, V.C., upon this doctrine, *ib.*; and see *Fearne*, C.R.

272, on the effect of executory devises as conditionally determining the preceding estate.

(*b*) *Lambarde v. Peach*, 4 Drew. 553; 28 L. J. C. 569; *Muggridge's Settlement*, Johns. 625; 29 L. J. C. 288.

(*c*) *Egerton v. Brownlow*, 23 L. J. C. 348, see the judgment of L. St. Leonards.

the event prescribed, the estate becomes defeasible by entry, but until entry the estate continues (a).

Accordingly this section is divided into sub-sections, treating (§ 1) of conditional limitations and (§ 2) of conditions of re-entry, or conditions strictly so called; and there will remain to be noticed some rules and doctrines of law relating to the construction and application of conditions in general which may be conveniently treated separately and which will constitute the matter of the third sub-section.

§. 1. CONDITIONAL LIMITATIONS.

Fee Simple conditional.

Fee tail with proviso for *cesser*—proviso for partial *cesser* void—proviso for *cesser* may be barred.

Estate for life with conditional limitation—proviso for *cesser* on alienation—estate for life terminable at will.

Estate for years determinable upon life or lives—term determinable by notice—proviso for *cesser* of satisfied terms—*cesser* by statute—assignment of satisfied terms to protect a purchaser.

Fee simple
conditional.

At the common law an estate in fee simple might be made determinable by a conditional limitation, so that

(a) See the distinction explained, *post*, p. 223. A condition precedent upon which an estate is limited to arise is sometimes included in the general term *conditional limitation*, but it has been justly remarked that "if the term *conditional limitation* is to be retained, it should rather be applied to those cases where the qualification is introduced in the very gift, as in the instance of a gift to A. until C. return to Rome; and indeed it was originally introduced in order to distinguish such limitations from limitations upon condition, of which only the grantor or his heir could take advantage. See Doug. 754 n (1). Mr. Fearne appears to be the first writer who

applied the expression to a shifting or secondary use." Sugden's note to Gilb. on Uses, p. 173. See Fearne, C.R. c. i. s. 3, and Butler's note (h), *Ib*; Butler's note (1) to Co. Lit. 203 b; Fearne, C. R. 272. Sanders (on Uses, 150,) also distinguishes a conditional limitation in the above sense from a shifting use. Preston distinguishes *limitations*, as operating of necessity by their own intrinsic force, whether precedently to create an estate or subsequently to defeat it, and *conditions*, strictly so called, being the conditions of re-entry which render the estate defeasible only by entry and do not necessarily defeat it. Preston, Shep. Touch. 117; and see

upon the happening of a certain event the estate ceased (a).

The limitation "to A. and to the heirs of his body," or "to A. and the heirs male of his body," created by the common law a fee simple conditional. The estate was a fee simple in quality ; but as to quantity or duration it was determinable by the failure of issue or issue male.—Such limitations were converted by the statute *De donis* into fees tail ; but where that statute did not apply, as was the case with land of customary tenure, such limitations, unless there were a special custom of entail in the manor, were, and they still are, construed to give a fee simple conditional, as at common law (b).

Other ancient instances of fees simple conditional or determinable by the terms of their limitation may be found ; but no such limitations could be made of freehold lands after the statute of *Quia emptores*, which prevented the creation of any seignory to which an escheat of the fee, upon the determination of the estate could attach. Since that statute conditional limitations annexed to a fee simple are, as such, simply void of effect, and the estate is absolute (c).

An estate tail may be created with a conditional limitation, or as it is here commonly called, a *proviso for cesser*, so that in a certain specified event the estate tail ceases, and the reversion or next vested estate in remainder takes effect in immediate possession (d).

Preston's definition of a limitation given *ante*, p. 152.

(a) Co. Lit. 1 b, 18 a, 19 b ; 10 Co. 97 b, in *Seymour's Case* ; see *ante*, p. 35.

(b) *Ib.* ; see *ante*, p. 37, 38, 81.

(c) See *ante*, p. 36 ; *Collier v. Walters*, L. R. 17 Eq. 252 ; 43 L. J. C. 216.

(d) 1 Sanders on Uses, 151, "Where the grantor only parts in the first instance with an estate less than the fee, the estate so created

may be defeated by a *conditional limitation* ; and upon the determination of it, the next subsequent estate immediately becomes vested without entry or claim." See *Scolastica's Case*, Plowd. 403 ; *Portington's Case*, 10 Co. 36 ; Fearne C. R. 258. In *Portington's Case* the conditional limitation that the estate tail should cease upon attempting to alien, was held void as being repugnant to the estate, to which a power of alienation by a proper disentailing as-

Fee simple conditional upon issue.

Fee tail with proviso for cesser.

Examples of
proviso for
cesser.

Instances occur in settlements in which estates tail are limited with the proviso that if the tenant in tail in possession shall refuse or neglect to take the name and arms of the settlor, the estate tail shall cease and determine as if he were dead and there were a failure of issue inheritable under the entail. A like proviso is sometimes used to determine the estate tail, if the tenant in possession shall neglect to reside upon the land,—or if he shall become entitled to some other settled estate (*a*).

Proviso for
partial cesser
void.

A proviso that in a certain event an estate tail shall cease as if the tenant in tail were dead is void; because an estate tail does not determine on death of the tenant in tail, but on death *without issue*, and because the proviso is uncertain in effect as to the intended destination of the property at his death. An estate tail cannot be limited to cease as to a tenant in tail only or during his life only, and to continue as to the other issue in tail; for such a limitation would be repugnant to the estate to which it is annexed (*b*). In the case of a will, the Court would probably supply the words “without issue” in order to effectuate the intention (*c*).

A mere direction in a will that devisees shall take the name and arms of the testator or the like, without words divesting the estate in case of non-compliance, will not operate as a conditional limitation, unless it must be necessarily so construed in order to effectuate the testator's intention (*d*).

surance is an inseparable incident. See *post*, p. 237.

(*a*) Fearn, C. R. 254 n (*e*); 1 Sanders on Uses, 127; *Johnson v. Foulds*, L. R. 5 Eq. 268, 37 L. J. C. 260; as to the construction of such provisos and their repeated operation, see *Doe v. Earl of Scarborough*, 3 A. & E. 897; as to what satisfies the condition of taking a name, see 1 Jarman on Wills, 848; or of acquiring a settled estate, see *Meyrick v. Mathias*, L. R. 9 Ch. 237; 43 L. J. C. 521; and as

to limitations over in such cases, see *post*, Chap. II. Sect. II. ‘Shifting Uses.’

(*b*) *Corbet's Case*, 1 Co. 83 *b*; *Mildmay's Case*, 6 Co. 40 *a*; 4 Burr. 1941, *Gulliver v. Ashby*; Butler's note (1) to Co. Lit. 223 *b*; Fearn, C.R. 252; see *Cat's Trusts*, 33 L. J. C. 495, 497, *per* Wood, V.C.

(*c*) See 1 Jarman on Wills, 814.

(*d*) See *Gulliver v. Ashby*, 4 Burr. 1929; 1 Bl. 607.

The power of disposition of a tenant in tail, extending to the creation of a fee simple absolute as against all persons claiming under or after the determination of the estate tail, is not restricted by a proviso for *cesser*; but such a proviso, in common with all other limitations operating subsequently upon the estate, may be barred by a disentailing assurance executed in the proper form (a). Proviso may be barred.

An estate for life may be made determinable by a conditional limitation;—as, if an estate be granted to a woman so long as she is unmarried, or until marriage, or during widowhood; or to a husband and wife during the coverture; or so long as the grantee shall dwell in a certain house, or until the grantee be promoted to a benefice, or for any like uncertain duration included in the life (b). Such limitations create estates for life, which are liable to determine and cease by the event happening according to the condition during the life; the next vested estate in remainder then takes effect in possession, and intervening contingent remainders, if there be any, are excluded (c). Estate for life with conditional limitation.

An estate for life may be limited to determine on alienation; or upon charging or attempting to charge the estate, or the rents and profits; so it may be limited to cease upon bankruptcy or insolvency (d). Conditions Proviso for cesser on alienation, etc.

(a) See *ante*, p. 39; 3 & 4 Will. IV. c. 74; therefore a proviso for cesser or determination of an estate tail, though extending to all the issue in tail, is not within "the rule against perpetuities." See *post*, Chap. II. Sect. V; see *Doe v. Earl of Scarborough*, 3 A. & E. 897.

(b) Co. Lit. 42 a; "So it is if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease for life to a widow, *si tamdiu in pura viduitate viveret*." Co. Lit. 214 b;—so, an estate to a woman *quamdiu se bene gesserit*. Co. Lit. 42 a;—an estate granted to a wife

"so long as her conduct shall be discreet." *Wynne v. Wynne*, 2 M. & G. 8;—an estate limited to a woman until she shall take the veil or enter a convent. *Dickson's Trusts*, 1 Sim. N. S. 37; 20 L. J. C. 33. As to the validity of limitations until marriage, see 2 W. & T. L. C. 189, notes to *Scott v. Tyler*; *Evans v. Roper*, 2 H. & M. 190; *Morley v. Rennoldson*, 2 Hare, 570, 580, *post*, p. 235.

(c) *Ib.*; see *Johnson v. Foulds*, L. R. 5 Eq. 268; 37 L. J. C. 260.

(d) Co. Lit. 233 b; *Brandon v. Robinson*, 18 Ves. 429, 433, *per*

in restraint of alienation cannot be annexed to an estate tail or an estate in fee simple, and in such cases they are void and inoperative, as being repugnant to an inseparable incident of the estate (*a*).

Estate for life determinable at will.

A lease for an uncertain term determinable at the will of the lessee only, executed in a manner to convey the freehold, is an estate for life determinable accordingly (*b*). A lease for an uncertain term purporting to be determinable at the will of the lessee, but not conveying the freehold, is determinable also at the will of the lessor, and creates at law only a tenancy at will (*c*). A lease determinable at the will of the lessor is necessarily not a freehold; and in the absence of any other limitation it is a tenancy at will, and is determinable by the lessee also (*d*).

Lease for years determinable upon life or lives.

An estate for years may be made determinable by a conditional limitation, as the continuance of a life or lives or other uncertain event. Thus, a lease for 100 years, if A. shall so long live, creates a term of years determinable upon the death of A.; and upon the death of A. there is no residue of the *term*, though there may be a residue of the years, so that a limitation over for the residue of the *term* is void, unless by *term* is meant

Eldon, L. C.; *Wilkinson v. Wilkinson*, 3 Swanst. 515; see estates limited until bankruptcy or insolvency, in *Muggeridge's Settlement*, Johns. 625; 29 L. J. C. 288; *Montefiore v. Enthoven*, 37 L. J. C. 43; *Billson v. Crofts*, L. R. 15 Eq. 314; 42 L. J. C. 531; *Aylwin's Trusts*, L. R. 16 Eq. 585; 42 L. J. C. 745; *Trappes v. Meredith*, L. R. 7 Ch. 248; 41 L. J. C. 237; *Robins v. Rose*, 43 L. J. C. 334; where see also what acts will determine them. An estate for life limited to a woman with a proviso for cesser on doing any act to deprive herself of the rents and profits was held to be determined by her marriage without

a settlement protecting the property from her husband, *Craven v. Brady*, L. R. 4 Ch. 296; 38 L. J. C. 345.

(*a*) Lit. s. 360; Co. Lit. 206 *b*; 223 *a*; *Portington's Case*, 10 Co. 35 *b*; and see *post*, Part IV. Chap. I. Sect. I. 'Restraint of Alienation.'

(*b*) See *ante*, p. 207; *Beeson v. Burton*, 12 C. B. 647; 22 L. J. C. P. 33.

(*c*) Co. Lit. 55 *a*; *ante*, p. 206; but it may give an interest in equity, *King's Leaseholds*, L. R. 16 Eq. 521.

(*d*) See *ante*, p. 206; *Davis v. Waddington*, 7 M. & G. 37; *Fernie v. Scott*, L. R. 7 C. P. 202; 41 L. J. C. P. 20.

the *time* and not the *interest* (a). A lease for so many years as A. shall live, not being limited by any certain period, is not an estate for years, but a freehold or an estate for life (b).—An estate for 100 years, if A. and B. shall so long live, determines upon the death of either of them; but an estate for the lives of A. and B. continues until the death of the survivor (c).

A lease during the minority of A. is a lease for the number of years A. wants of twenty-one, if he shall so long live (d). Lease during minority.

An estate for years certain may be made determinable by notice to be given by either party (e); but a lease for so long as the lessee pleases to continue tenant, being otherwise unrestricted, is an estate for life terminable at the will of the lessee (f). Term determinable by notice.

A proviso for *cesser* is often applied to long terms of years created for various purposes, with the object and effect of making the terms to cease when the purposes of their creation have been satisfied. The terms referred to are used for the purpose of securing the payment of sums of money, as debts upon mortgage, or the sums to be raised for the jointures of widows and the portions of children in family settlements. The term is vested in trustees upon trust to raise and pay the charges imposed, and, subject thereto, upon trust for the owners of all other estates in the land in the order of their limitation, or, as it is called, upon trust *to attend the inheritance*. Proviso for the *cesser* of satisfied terms.

A term settled in this manner does not interfere with the beneficial ownership of the land until the occasion of the charge arises, and it then affords the ready means of raising the sum charged by an actual receipt

(a) Co. Lit. 45 b; *Rector of Chedington's Case*, 1 Co. 153 a; *Wright v. Cartwright*, 1 Burr. 282; see *ante*, p. 197.

(b) Co. Lit. 45 b; *ante*, p. 200.

(c) 5 Co. 9 b, *Brudnel's Case*; see *ante*, p. 192.

(d) 6 Co. 35 b, *Bp. of Bath's Case*; Plowd. 273; see *Boraston's Case*, 3 Co. 19 a.

(e) See *ante*, p. 200; *Doe v. Baker*, 8 Taunt. 241; 2 Moore, 189.

(f) See *ante*, p. 207, 220.

of the rents and profits, or, if necessary, by a sale or mortgage. The efficacy of the term for this purpose by reason of the length, which is sometimes extended to 500 or 1000 years, is equivalent to the fee simple, while, being only a chattel interest, it in no way interferes with the limitation, transfer, or devolution of the freehold subject to the term.

Satisfied terms
attendant upon
the inheritance.

Formerly, if there were no express proviso for *cesser* upon the purposes of the term being satisfied, the term, unless exhausted by those purposes, and unless surrendered to the tenant of the freehold (and after lapse of time such a surrender might be presumed), continued as attendant upon the inheritance, and entitled the immediate freeholder to the beneficial interest; and if not expressly declared to be attendant in its original creation, it became so by construction of equity (a).

Cesser of satisfied terms by statute.

But the term is now disposed of by the statute 8 & 9 Vict. c. 112, which enacts by sect. 2, "that every term of years now subsisting or hereafter to be created, becoming satisfied after 31st December, 1845, and which either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine" (b).

Assignment of satisfied terms to protect purchaser.

Sect. 1 of the statute provided in like manner for the the *cesser* of terms which upon the 31st December, 1845, were attendant upon the inheritance, except as to the protection to which any person might then be entitled to therefrom. The protection in question was obtained by a purchaser or mortgagee of the inheritance procuring an assignment of the term to be made to a trustee on his behalf, instead of taking an assignment to himself whereby it would become

(a) 1 Sanders on Uses, 292-297; as to presumed surrenders, see Burton, Comp. (914).

(b) See *Anderson v. Pignet*, L.

R. 11 Eq. 329; Ib. 8 Ch. Ap. 180, 42 L. J. C. 310, as to what constitutes a satisfied term within the Act.

merged and cease. He had then the protection of the prior title of the term against any intervening dealings with the inheritance of which he had no notice (a).

§ 2 CONDITIONS.

Condition—distinguished from conditional limitation—words of limitation—words of condition.

Condition annexed to freehold—operates by entry or claim.

Condition annexed to leasehold—requires no entry unless so stipulated—construction of conditions in leases.

Condition can be reserved only to the grantor and his heirs—was not assignable at common law—distinction as to the reversion upon a conditional limitation.

Waiver of condition—cannot be retracted—cannot operate after avoidance—effect of writ in ejectment as election to avoid.

Effect of condition in avoiding the estate—effect upon mesne estate and charges—upon remainders and ulterior limitations.

Conditions implied in tenure—expressed in the grant—effect of the statute *quia emptores*.

Conditions in mortgages at common law—equity of redemption—proviso for redemption.

Conditions in leases for payment of rent—for performance of covenants.

A condition, strictly so called, differs in operation from a conditional limitation. An estate upon condition is not void, but voidable only by entry or claim under the condition; and unless the right of avoidance is exercised the estate continues. A conditional limitation determines the estate *ipso facto* by mere force of the terms, leaving, in the case of particular estates, the next vested remainder, or the reversion, to take effect in immediate possession (b).

Condition distinguished from conditional limitation.

(a) *Willoughby v. Willoughby*, 1 T. R. 763; *Goodtitle v. Jones*, 7 T. R. 47; *Wynn v. Williams*, 5 Ves. 130; *Maundrell v. Maundrell*, 10

Ves. 246, 270.

(b) Co. Lit. 214 b; Plowden, 242; *Newis v. Lark*, (*Scolastica's Case*), Plowd. 408; Shepp. Touch.

Hence it may be observed that a condition annexed to an estate with a conditional limitation, purporting to defeat the estate in the same event which determines it by the express limitation, would be superfluous and void as regards that estate; "for if a gift in tail be made to a man and to the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall re-enter, this is a void condition" (a).

Distinction in construction.

The distinction in construction is said to lie in the terms used,—between words of limitation and words of condition. But it seems that the distinction carrying with it so great a difference in operation, must depend rather upon the intention and effect than upon the exact letter of the words (b).

Words of limitation.

Apt words of limitation are:—"durante, as *durante viduitate* or *durante vitá*, etc.—*dum*, as *dum sola fuerit*,—*dummodo*, as *dummodo solveret talem redditum*,—*quamdiu*, as *quamdiu se bene gesserit*, *quamdiu* the grantor shall be dwelling upon the manor,—and so by these words, *donec*, *quousque*, *usque ad*, *tamdiu*, *ubicunque*" (c).

Words of condition.

Words of condition are, *sub conditione*, *proviso*, *ita quod*, *si contingat*, etc. (d). And "it is to be observed that many words in a will do make a condition in law, that make no condition in a deed" (e).

by Preston, Ch. vi. As to the acceleration of the remainder, see *Lambard v. Peach*, 4 Drew. 553; 28 L. J. C. 569; a remainder which is contingent at the time the conditional limitation takes effect, fails altogether. *Johnson v. Foulds*, L. R. 5 Eq. 268; 37 L. J. C. 260.

(a) Co. Lit. 224 b; and see Plowden, 33; Shepp. Touch. by Preston, 127. But a condition, it will be seen, may have a more extensive effect than a conditional limitation, by defeating all the estates in remainder limited under the same feoffment or grant, see *post*, p. 230.

(b) 10 Co. 41 b, *Portington's Case*; Shepp. Touch. by Preston, p. 121; 1 Sanders on Uses, 151.

(c) Co. Lit. 234 b, 235 a; 10 Co. 41 b, *Portington's Case*.

(d) Lit. ss. 328-331; 10 Co. 42 b; 8 B. & C. 315, *Doe v. Watt*. "Conditions annexed to estates are sometimes so placed and confounded amongst covenants; sometimes so ambiguously drawn; and at all times have in their drawing, when deeds etc. are prepared by unskilful persons, so much affinity with limitations, that it is hard to discern and distinguish them." Shepp. Touch. by Preston, 121; and see the rules for distinguishing and construing conditions there stated.

(e) Co. Lit. 236 b; and see 1 Jarman on Wills, 796.

There is a difference in the operation of a condition annexed to a freehold, and a condition annexed to a lease for years, arising from the difference in quality of those estates. A freehold estate commencing, at common law, by livery cannot be divested under a condition without a resumption of the seisin by entry, hence the condition, though expressly worded that upon a certain act or event the estate shall cease and be void, imports only that a right of entry is given to avoid it; the estate does not become *ipso facto* void under the condition, but voidable only by entry (a).

Condition annexed to freehold requires re-entry.

“Regularly, when any man will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make a claim, and the reason is, for that a freehold and inheritance shall not cease without entry or claim” (b).

Or claim.

The *claim* above referred to applies to things which do not lie in livery and of which there can be no entry or possession. Thus, “of a reversion or remainder, of a rent or common or the like there must be a claim before the estate be revested in the grantor by force of the condition, and that claim must be made upon the land. *A fortiori*, in case of a feoffment which passeth by livery of seisin, there must be a re-entry by force of the condition before the estate be void” (c).

(a) Lit. s. 351; Co. Lit. 214 b; 3 Co. 65 a, *Pennant's Case*; 8 Co. 95 b, *Manning's Case*; 1 Wms. Saund. 287 d, notes *Duppa v. Mayo*.

(b) Co. Lit. 218 a. Again it is said that “an estate of freehold cannot begin nor end without ceremony.” Co. Lit. 214 b. But the expression ‘cease’ or ‘end’ in these passages is used with reference only to the defeasance of a freehold estate under a *condition*; for a freehold may cease or end *ipso facto* under a *conditional limitation* by the terms of its creation. See Co. Lit. Ib.; *ante*, p. 219.

(c) Co. Lit. 218 a; in the case of a rent charge out of the grantor's own land upon condition, if the condition be broken, the grantor being in possession need make no claim upon the land; the law will adjudge the rent void without any claim. Ib. The statute enacting that corporeal hereditaments shall now lie in grant applies in terms only “as regards the conveyance of the immediate freehold,” and though it dispenses with livery to commence an estate of freehold, it does not affect the rule requiring an actual entry to revest the freehold under a condition. See *ante*, p. 51.

Condition annexed to lease for years does not require entry unless so stipulated.

"A lease for years may begin without ceremony, and so may end without ceremony," being at common law a mere matter of contract. Therefore a condition to defeat it does not require an actual entry, unless expressly stipulated for. Where the condition is worded simply that in a certain event the lease shall cease or be void, without further requiring in terms that the lessor shall re-enter, the lease may become void *ipso facto* without entry, according to the condition, as in the case of a conditional limitation (*a*).

Conditions requiring re-entry.

The following are some examples of the construction of conditions in leases in this respect:—Upon a lease for sixty years to A. with a proviso that, if A. should die within the sixty years, it shall be lawful for the lessor to enter, the lease is not determined by the death of A., but becomes determinable by re-entry upon his death by the express terms of the condition (*b*). A proviso in a lease that in a certain event "the term shall cease and be void, and it shall be lawful for the lessor to re-enter" is construed to render the lease voidable only by actual entry; because if the lease were construed to be void *ipso facto* without such entry, the latter part of the clause would have no effect (*c*). But this construction does not apply where the right of re-entry is expressed to be given upon an antecedent notice, for in such case there is no necessity for an actual re-entry, the election of the lessor to resume possession being effectually made by the notice (*d*).

A proviso for the avoidance of a lease for years on

(*a*) Co. Lit. 214 *b*; 1 Wms. Saund. 287 *d*; *per* Bailey, J., 12 East, 448, *Fenn v. Smart*; *per* Littledale, J., *Roberts v. Davey*, 4 B. & Ad. 664, 671; *Doe v. Baker*, 8 Taunt. 241; 2 Moore, 189; see *Liddy v. Kennedy*, L. R. 5 H. L. 134, 151, 154.

(*b*) *Bishop of Bath's Case*, 6 Co. 34 *b*.

(*c*) *Arnsby v. Woodward*, 6 B. & C. 519; see *Bowser v. Colby*, 1 Hare,

109, 130.

(*d*) *Liddy v. Kennedy*, L. R. 5 H. L. 134, see *per* L. Westbury; in that case the lease contained a clause declaring that it should be lawful for the lessor "upon giving three months' previous notice in writing of an intention to resume possession, to enter," and it was held that there was no necessity for an actual entry after the notice in order to maintain ejectment.

non-payment of rent, breach of covenant, or other default of the lessee, although there be no requirement of entry, is construed to render it voidable only in favour of the lessor, who must give notice or do some other act showing his intention to avoid it; it does not enable the lessee to put an end to the lease by his own default (a).

Condition avoiding lease on default of lessee, makes it voidable only.

“In a lease for years no precise form of words is necessary to make a condition. It is sufficient if it appear that the words used were intended to have the effect of creating a condition. They must be the words of the landlord because he is to impose the condition” (b).—“And so it is if a man by indenture letteth lands for years, *provided* always, and it is *covenanted and agreed* between the said parties, that the lessee shall not alien, and it was adjudged that this was a condition by force of the *proviso*, and a covenant by force of the other words” (c).—And it is laid down as “a general rule that where a proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it would be void; but if a penalty is annexed, it is otherwise” (d).

Construction of conditions in leases.

Proviso operating as a condition.

A condition can be reserved in a conveyance at common law only to the grantor or lessor of the estate and to his heirs, and to no other person (e). If a devise be made by will upon condition, the heir of the testator would be entitled to enter upon breach of the condition (f). A condition may be reserved upon a conveyance in fee simple, leaving no reversion; or upon an assignment of a term of years, leaving no reversion (g).

Condition can be reserved only to the grantor and his heirs.

(a) *Rede v. Farr*, 6 M. & S. 121; *Doe v. Bancks*, 4 B. & Ald. 401; *Roberts v. Davey*, 4 B. & Ad. 664; *Jones v. Carter*, 15 M. & W. 718, 725; see 1 Smith's L. C. 19, 3rd ed. notes to *Dumpor's Case*; 1 Wms. Saund. 287 d, n (u).

(b) *Doe v. Watt*, 8 B. & C. 308, 315.

(c) Co. Lit. 203 b; *Doe v. Watt*, supra, where it was “stipulated

and conditioned” that the lessee should not assign, etc., and held to be a condition, and not merely a covenant.

(d) *Doe v. Watt*, 8 B. & C. 316, and see the cases there cited.

(e) Lit. s. 347; Co. Lit. 214 a, 379 a; Perkins, ss. 830, 831.

(f) See *Doe v. Pearson*, 6 East, 173.

(g) Lit. s. 325; Co. Lit. 202 a,

Condition not assignable at common law.

A condition was not assignable at common law, either with or without a reversion; but it was made to pass with a reversion in certain cases by 32 Hen. VIII, c. 34 (a); and by 8 & 9 Vict. c. 106, s. 6, "a right of entry, whether immediate or future, and whether vested or contingent, may be disposed of by deed" (b).

Distinction as to reversion upon conditional limitation.

Hence arose a diversity, as stated by Coke, "between a condition that requireth a re-entry, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger shall take any advantage, as hath been said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, until J. S. come from Rome, the lessor grant the reversion over to a stranger; J. S. comes from Rome, the grantee shall take advantage of it and enter, because the estate by express limitation of it was determined. So it is if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease to a widow, *si tamdiu in purâ viduitate viveret*. So it is if a man make a lease for 100 years if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causâ quâ suprà*" (c).

Waiver of condition.

The forfeiture under a condition is waived and dispensed with, if the grantor or lessor, after having knowledge of the grounds of forfeiture, does any act unequivocally affirming the continuance of the estate or tenancy; as by accepting, suing for, or claiming rent subsequently accruing due (d). Distraint for rent may have the same effect of affirming the tenancy, because it is only

202 b; *Doe v. Bateman*, 2 B. & Ald. 168.

(a) As to this statute and when it applies, see *post*, Part IV. Chap. I., and see Bullen & L. Prec. Pl. 207, 3rd ed.

(b) See *ante*, p. 59; and see *post*, Part IV. Chap. I.

(c) Co. Lit. 214 b; 3 Co. 65 a,

Pennant's Case; 8 Co. 95 b, *Manning's Case*.

(d) Co. Lit. 211 b; *Pennant's Case*, 3 Co. 64 a; *Doe v. Birch*, 1 M. & W. 402; *Doe v. Pritchard*, 5 B. & Ad. 765; *Dendy v. Nicholl*, 4 C. B. N. S. 376; 27 L. J. C. P. 220; notes to *Dumfries's Case*, 1 Smith, L. C. 30, 6th ed.

justifiable during the continuance of the tenancy or (by the statute 8 Anne, c. 14, s. 6,) within six months after its determination (a).

Such acts of waiver of the forfeiture operate as an election not to avoid the estate, which when once made and duly expressed cannot be retracted; according to the maxim "*quod semel placuit in electionibus amplius displicere non potest*" (b). But they operate only upon past breaches or forfeitures; and if the condition be a continuing one, a subsequent breach will again entitle the grantor or lessor to re-enter (c).

On the other hand, where the election is duly made by entry or otherwise to avoid the estate, or where it becomes *ipso facto* void under the condition or limitation, no acceptance of rent or other act of waiver can afterwards revive or continue it (d). But such acts may be evidence of a new tenancy (e).

The service of a writ of ejectment, by treating the tenant as a trespasser, operates as a conclusive election to avoid a lease, and it may be referred back to the earliest breach or ground of forfeiture upon which the plaintiff relies in support of the action. It therefore precludes the lessor from suing for subsequent rent or subsequent breaches under the lease. And, on the other hand, it prevents any subsequent act, as distraining for or accepting the rent in arrear, from operating as a waiver of the forfeiture upon which the ejectment is founded (f).

(a) *Ward v. Day*, 4 B. & S. 337; 33 L. J. Q. B. 3; *Grimwood v. Moss*, L. R. 7 C. P. 360; 41 L. J. C. P. 239; see *Cox v. Leigh*, L. R. 9 Q. B. 333; 43 L. J. Q. B. 123.

(b) See *Croft v. Lumley*, 6 H. L. C. 785; 27 L. J. Q. B. 321, *per* Bramwell, B., adopted in *Clough v. London & N. W. Ry. Co.*, 41 L. J. Ex. 17, 23; *Ward v. Day*, 33 L. J. Q. B. 3, 254; 5 B. & S. 359.

(c) *Doe v. Peck*, 1 B. & Ad. 428; *Doe v. Gladwin*, 6 Q. B. 953; *Doe v. Jones*, 5 Ex. 498; see the statute

23 & 24 Vict. c. 38, s. 6, cited *post*, p. 241.

(d) Co. Lit. 215 a; 3 Co. 64 b, *Pennant's Case*; "a confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void in law." Co. Lit. 295 b.

(e) See *Blyth v. Dennett*, 13 C. B. 178; 22 L. J. C. P. 79.

(f) *Jones v. Carter*, 15 M. & W. 718; *Grimwood v. Moss*, L. R. 7. C. P. 360, 41 L. J. C. P. 239; *Coleman v. Portbury*, L. R. 7. Q.

Condition avoids the estate and reverts it in the grantor.

A condition avoids the estate to which it is annexed, and reverts the original estate of the grantor or lessor so far as the circumstances permit (*a*). "Regularly it is true that he that entereth for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition, but yet this faileth in many cases:—1. In respect of impossibility,—2. In respect of necessity,—3. In respect of some collateral qualities" (*b*).

But the right of action remains on covenants in a lease for arrears of rent or breaches committed before re-entry; and it was so held notwithstanding the proviso expressed that the lessor upon re-entry should have the premises again "as if the indenture of lease had never been made" (*c*).

Cannot avoid it in part only.

A condition, like a conditional limitation, must in general defeat or determine the whole estate to which it is annexed. It cannot avoid the estate in part only, and continue it in part. Thus a proviso for the *cesser* of an estate tail, during the life of the tenant in tail only, is repugnant and void (*d*).

Avoids mesne estates and charges.

A condition also avoids all mesne estates and incumbrances created out of or charged upon the estate (*e*). But conditions implied in law, as the conditions of tenure, do not affect the estates and incumbrances created before the act of forfeiture (*f*).

Avoids estates in remainder.

At common law if the land be limited for a particular estate with remainders, subject to a condition, the re-entry defeats all the estates in remainder, as being de-

B. 344; 41 L. J. Q. B. 98, where it was held that the particulars of breaches given in the action did not operate as an admission of the tenancy at the various times of those breaches, but left it open to the plaintiff to rely on any of them.

(*a*) Lit. s. 325.

(*b*) Co. Lit. 202 *a*, and see the instances there given.

(*c*) *Hartshorne v. Watson*, 4 Bing. N. C. 178.

(*d*) 1 Co. 85 *b*, 86 *b*, *Corbet's Case*; *ante*, p. 218.

(*e*) Perkins, s. 840; see *Mayow's Case*, 1 Co. 146 *b*.

(*f*) Co. Lit. 233 *b*, where see the distinction as to conditions by statute; 1 Co. 67 *a*, *Archer's Case*; Perkins, s. 844; *post*, p. 231.

pendent upon the seisin of the particular estate (*a*). But where a particular estate is limited subject to a condition, and a remainder is limited over independently of that condition, as the entry would defeat the remainder, the condition, unless it can be construed as a limitation determining the preceding estate without entry so as to support the remainder, is repugnant and void (*b*).

A condition of re-entry has no effect upon springing uses and executory devises which operate in substitution of the estate to which the condition is annexed; for these limitations arise quite independently of the preceding estate (*c*).

Does not avoid springing uses and executory devises.

At common law the services and duties of the tenure constituted an implied condition of the continuance of the estate; a refusal of the services or a denial of the tenure was visitable with forfeiture, and entitled the lord or reversioner to re-enter and resume possession.—Other conditions might be annexed in express terms to the grant of an estate with the like effect of giving to the grantor or his heirs the right to re-enter and resume possession upon breach of the condition (*d*).

Conditions implied in tenure.

Conditions expressed in the grant.

By the common law, it was a condition in law annexed to the estate of tenant for life or for years or other particular estate, that if he made a tortious alienation of the seisin it was a forfeiture of his estate, and the reversioner or remainder man might enter; so if he claimed a greater estate in a court of record. But conveyances have no longer any tortious operation (*e*). Entry was necessary

Condition in law against tortious conveyance.

(*a*) Plowd. 412, in *Newis v. Lark*; and see Lit. s. 723; 1 Sanders on Uses, 152; see *ante*, p. 46.

(*b*) Fearn, C. R. by Butler, 270; 10 Co. 40 *b*, in *Portington's Case*; Shepp. Touch. by Preston, 120, 121, see *Kinnersley v. Williamson*, 39 L. J. C. 788, where it was held that a remainderman has no equity to compel the tenant for life to perform a condition. In a devise by will a

condition may be annexed to the particular estate only without affecting the remainder. *Warren v. Lee*, Dyer, 126 *b*.

(*c*) See *ante*, p. 68, 112.

(*d*) Lit. s. 325, 378; Butler's note (1) to Co. Lit. 201 *a*; Co. Lit. 233 *b*. Butler's note to Fearn, C. R. p. 382. Perkins, s. 722.

(*e*) See *ante*, p. 57, 58; Co. Lit. 233 *b*.

on the part of the lessor to avoid the estate, whether it was a freehold or leasehold, in respect of the conditions implied in the tenure (a).

Express conditions not affected by statute *quia emptores*.

The right of entry for breach of the conditions implied in the tenure could not be reserved upon an alienation in fee after the statute *quia emptores*, for that statute prohibited the creation of a sub-tenure and the grantee held only of the chief lord of the fee; but a right of entry upon positive conditions expressed in the grant, may be reserved to the grantor and his heirs notwithstanding the statute *quia emptores* (b).

Condition in mortgage at common law.

Express conditions of re-entry were employed at common law in mortgages of land. The mortgagor conveyed the land to the mortgagee by feoffment, or other appropriate legal assurance, upon condition that if he paid at a certain day the amount of the debt he might re-enter and resume his former estate (c).

Equity of redemption.

On failure to perform the condition by payment at the day appointed, the estate of the mortgagee became absolute and indefeasible at law; but the Court of Chancery, regarding the transaction merely as a pledge of the land for the debt, allowed to the mortgagor a right or equity of redemption by payment of the debt and interest at any time, and compelled the mortgagee thereupon to reconvey the land; giving the mortgagee at the same time the right of foreclosure, that is, of applying to the court to bar the equity of redemption in default of payment by an appointed day (d).

(a) *Fenn v. Smart*, 12 East, 451.

(b) Lit. s. 325; see *ante*, p. 18, 227; *Doe v. Bateman*, 2 B. & Ald. 168, 170.

(c) Lit. ss. 332, 333.

(d) "This court says, that though the money is not paid at the time stipulated, if paid with interest at the time a re-conveyance is demanded, there shall be a re-conveyance; upon this ground, that the

contract is in this court considered a mere loan of money, secured by a pledge of the estate. But that is a doctrine, upon which this court acts against what is the *prima facie* import of the terms of the agreement itself; which does not import at law, that, once a mortgage, always a mortgage; but equity says that." *Per Eldon*, L. C., 7 Ves. 273, in *Seton v. Slade*.

A modern mortgage recognises the equitable view of the transaction by substituting for the condition of re-entry an express proviso for redemption, imposing a trust to reconvey on payment of the debt and interest (*a*). Proviso for redemption.

A condition of re-entry is frequently applied to secure the payment of rents reserved, in addition to the other remedies by action or distress (*b*). At common law a condition of re-entry simply "if the rent be in arrear" implies several subordinate conditions, which must be strictly complied with at all points in order to maintain a forfeiture and re-entry. These may be summed up in the requirement that a demand must be first made of the precise sum due, and at the exact time and place required by law under the various circumstances of the case (*c*). Conditions in leases for payment of rent. Demand necessary at common law.

The strict compliance with these requirements was relaxed in some cases by statute 4 Geo. II. c. 28, s. 2, re-enacted by 15 & 16 Vict. c. 76, (the C.L.P. Act, 1852,) s. 210, in the following terms:—"In all cases between landlord and tenant, as often as it shall happen that one half-year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises; [the statute proceeds to provide a substituted service;] and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half-a-year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, Statute enabling ejectment without demand or entry.

(*a*) See 'Mortgages,' *post*, p. 278.

(*b*) Lit. ss. 325, 326, 347; Co. Lit. 1b.

(*c*) See Co. Lit. 201 b, as to the

requisites of a demand and the mode of making it and the reasons for it; and see 1 Wms. Saund. 286 b, n (16).

and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made."

Condition expressly stipulating for demand, etc.

If the condition of re-entry expressly provides for the time and manner of demanding the rent, or adds any other conditions precedent to the right of re-entry, such express provisions may supersede the implied conditions of the common law, and must be duly complied with (a).

Conditions for performance of covenants.

A condition of re-entry is also used for securing the due performance of covenants in leases, by giving a right of re-entry upon a breach of covenant, as with covenants to repair and to insure, covenants respecting the mode of occupying and using the premises and the like.—"Where the proviso for re-entry uses apt words, the power of re-entry may be just as well reserved for breaking a *negative* covenant, as for not performing a *positive* one" (b).—"An assignee of such an estate takes it subject to the condition and liable to be divested by the breach of it. It is immaterial in this respect whether the condition is for the performance of some covenant which touches the land and runs with it, or one which is wholly collateral. Upon the breach of either species of covenant, the estate ceases when the lessor chooses to take advantage of his right of re-entry" (c).—The entry for a forfeiture does not bar the remedy for the rent in arrear or breach occasioning the forfeiture, or for previous rent or breaches, under the covenants or contract contained in the lease (d).

Remedy for past rent and breaches of covenant.

(a) *Phillips v. Bridge*, L. R. 9 C. P. 13; 43 L. J. C. P. 13, and see the cases there cited upon the construction of such conditions. As to the construction and application of the statute, see Chitty's Statutes; Day's C. L. P. Acts; 1 Wms. Saund. 287 a.

(b) *Per Blackburn, J.*, L. R. 6 Q. B. 648, in *Wadham v. Postmaster General*, and see as to such cove-

nants, *Ib.* *Toleman v. Portbury*, L. R. 7 Q. B. 344; 41 L. J. Q. B. 98.

(c) *Per curiam, Doe v. Peck*, 1 B. & Ad. 428, 436, as to the right of the assignee of the lessor to the benefit of conditions, see *ante*, p. 228; *post*, Part IV. Chap. I.

(d) *Hartshorne v. Watson*, 4 Bing. N. C. 178; see *Price v. Woodward*, 4 H. & N. 512; 28 L. J. Ex. 329.

§ 3. CONSTRUCTION AND APPLICATION OF CONDITIONS.

Illegal and impossible conditions void—examples.

Conditions void for uncertainty.

Conditions void as repugnant to the estate limited.

Construction of conditions—conditions construed as subsequent rather than precedent—construed strictly in favour of vesting, and against divesting—condition of re-entry construed strictly as to the person.

Conditions determined by licence—statute restricting licence to specific act—waiver of breach restricted to specific instance.

Relief against conditions—at law—in equity—under the Judicature Act.

There remain to be noticed in this sub-section some rules and doctrines of law relating to conditions generally, and the construction and application of conditions.

Conditions which in their matter or object are illegal or impossible, are void and inoperative. Hence, if the condition be precedent, that is, if the estate be limited to arise upon such a condition, both the condition and the estate are void; if the condition be subsequent, that is, if the estate be determinable upon such a condition, whether as a conditional limitation or as a condition of re-entry, the condition only is void, and the estate good and absolute. And the same rules apply whether the condition be illegal or impossible at the time of limiting the estate, or whether it become so afterwards (*a*).

Conditions operating in restraint of marriage supply some examples:—Where a gift was made to a woman for life, with a gift over if she married, it was held that the condition, operating in restraint of marriage, was illegal, and the gift over void, and consequently the prior gift remained absolute notwithstanding marriage.

Illegal and impossible conditions are void.

Examples,—conditions in restraint of marriage.

(*a*) Co. Lit. 206 *a*, *b*; 218 *a*; Jarman on Wills, 805, 807: see Perkins, ss. 722, 735; Shepp. *Roundell v. Curren*, 2 Bro. C. C. Touch. by Preston, 132, 133; 1 67, 73.

But a limitation to a person until marriage is valid and cannot be enlarged by reason of its operating in restraint of marriage; for in such case there is nothing to give an interest beyond the marriage (*a*). A devise to A. for life, if she continued unmarried, but if she married with the consent of certain persons, she should have the estate as if she had continued unmarried, was construed to be a life estate, subject to the condition subsequent determining the estate if she married in the lifetime of the persons without their consent; which condition became impossible by the death of those persons, and the estate for life became absolute (*b*).

Other examples. Lands were devised by will for estates tail to the heirs male of the body of A. with a proviso that if A. should die without having acquired the title of Duke or Marquis of B. to him and the heirs male of his body, the estates so devised should cease and be void; it was held that the proviso was a condition subsequent and was void as being contrary to public policy, and that consequently the estates were absolute (*c*).—Where a devise was made upon condition that the devisee should convey part of the devised estate to a charity, the condition was held illegal and void and the devise absolute (*d*).—A devise to A. was conditioned to be void if he should refuse upon request to convey an estate to B., the testator having subsequently to the making of his will rendered the condition impossible by himself purchasing the estate, the devise was held to be absolute (*e*).

(*a*) *Morley v. Rennoldson*, 2 Hare, 570, 580, where the V. C. Wigram said, "If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage." See *Scott v. Tyler*, 2

Bro. C. C. 431; 2 W. & T. L. C. 125, as to conditions in restraint of marriage. See *ante*, p. 219.

(*b*) *Aislabie v. Rice*, 3 Madd. 256.

(*c*) *Egerton v. Brownlow*, 23 L. J. C. 348, in H. L.

(*d*) *Poor v. Miall*, 6 Madd. 32.

(*e*) *Walker v. Walker*, 29 L. J. C. 856; see *Middleton v. Windrop*, L. R. 16 Eq. 212; 42 L. J. C. 555.

If a condition is so expressed that it is impossible to ascertain with certainty the event or contingency upon which the estate is to arise or be defeated, it is equivalent to being impossible and is equally inoperative (a). So also, if it be expressed with such uncertainty that it is impossible to say what is the effect intended as to the destination of the property; as where an estate in fee or an estate tail is limited to cease and go over as if the tenant were dead (b). And it is said that if there be a limitation over which does not meet the event on which a previous estate is to cease, there is, in general, not sufficient certainty to determine the previous estate before the limitation over takes effect (c).

Condition void for uncertainty.

So, if the condition be in the event uncertain, it is inoperative; thus "if a lease be made to a man and a woman for their lives upon condition that which of them two shall first marry, that one shall have the fee, and they intermarry, neither of them shall have the fee, for the uncertainty" (d).

A condition annexed to an estate which is repugnant to the estate limited is void. Thus, a condition that tenant in fee simple or tenant in tail shall not alien the land is repugnant and void, because the power of alienation is an inseparable incident of such estates (e). So a condition annexed to an estate purporting to dispose of it in case of intestacy is repugnant to an absolute interest and void (f). A condition that if a devisee take any

Conditions repugnant to the estate.
Condition against alienation.

(a) Sheppard's Touch. by Preston, 128; Fearn, C. R. 255, *Fillingham v. Bromley*, Turn. & Russ. 530; *Doe v. Carew*, 2 Q. B. 317; *Clavering v. Ellison*, 25 L. J. C. 274, 278, per Kindersley, V.C., see S. C. 26 L. J. C. 335; 29 Ib. 761.

(b) *Catt's Trusts*, 33 L. J. C. 495; see ante, p. 218.

(c) Per Turner, V.C. *Rochford v. Hackman*, 21 L. J. C. 511, adopted by Wood, V. C. in *Catt's*

Trusts, supra.

(d) Co. Lit. 218 a.

(e) Lit. s. 360; Co. Lit. 223 a, 224 a; 6 Co. 41 a, *Mildmay's Case*; *Portington's Case*, 10 Co. 36, see post, Part IV. Chap. I. 'Restraint of Alienation.'

(f) *Holmes v. Godson*, 8 D. M. & G. 152; 25 J. L. C. 317; so an absolute gift with a gift over of so much as shall not be disposed of. *Perry v. Merritt*, L. R. 18 Eq. 153.

proceedings at law or in equity his estate shall go over as was held repugnant and void (*a*).

Condition
against taking
the profits.

A condition annexed to an estate in fee simple or fee tail that the tenant shall not take the profits of the land is repugnant and void (*b*). So, a condition that the land shall be let for ever at a definite rent (*c*).

Construction of
conditions.

It is a general principle of construction that conditions are not favoured, that is to say, limitations of estates in terms importing conditions are to be construed generally in favour of vested and indefeasible estates (*d*).

Condition con-
strued as subse-
quent rather
than precedent.

Hence the rule that a condition annexed to an estate is to be construed as a condition subsequent rather than precedent.—“Conditions are either precedent or subsequent; in other words, either the performance of them is made to *precede* the vesting of an estate, or the non-performance to determine an estate antecedently vested. But though the distinction between these two classes of cases is sufficiently obvious in its consequences, yet it is often difficult, from the ambiguity and vagueness of the language of the will, to ascertain whether the one or the other is in the testator’s contemplation. On questions of this nature general propositions afford but little assistance in dealing with particular cases of difficulty” (*e*).

Hence also, words of contingency are referred, if

(*a*) *Rhodes v. Muswell Hill Land Co.* 29 Beav. 560; 30 L. J. C. 509. “There are three manner of conditions *in fact*, which are not good, viz. conditions against the law, conditions *repugnant*, and conditions impossible.” Perkins, s. 722.

(*b*) Co. Lit. 206 *b*; Perkins, s. 731; Sheppard Touch. by Preston, 131.

(*c*) *Att. Gen. v. Catharine Hall*, Jac. 395; see *Tibbetts v. Tibbetts*, 19 Ves. 656.

(*d*) This principle of construction finds its chief application in construing future limitations; as re-

mainders which are to be taken as vested rather than contingent, and executory limitations and devises which are to be taken as referring to the time of possession rather than the vesting of the interest, see *post*, Chap. II. Sect. I, III.

(*e*) 1 Jarman on Wills, 796, and see the instances of construction there given. Hawkins on Wills, 237; see *Egerton v. Brownlow*, 23 L. J. C. 348; *Woodhouse v. Herri-
rick*, 1 K. & J. 352; 24 L. J. C. 649; *Yates v. University College*, L. R. 8 Ch. 454; 42 L. J. C. 566.

possible, to the limitation over; thus, a devise to A., "if he should live to attain twenty-one," or "when he attains twenty-one," with a devise over in case he should die before attaining that age, is construed as giving to A. an immediate vested estate, subject to be divested by the devise over taking effect upon his death under twenty-one (a).

Words of contingency referred to the limitation over.

Hence also the rule that a condition precedent is construed *strictly* in favour of vesting the estate; and that a condition subsequent is construed *strictly* against divesting the estate.—"Provisoos and conditions which go in destruction and defeasance of estates are odious in law and shall be taken strictly; for, *conditio beneficiæ quæ statum destruit, benignè secundum verborum intentionem est interpretanda; odiosa autem quæ statum destruit, strictè secundum verborum proprietatem est accipienda*" (b).

Conditions construed strictly in favour of vesting and against divesting.

Upon the above principles of construction a condition of re-entry reserved to a grantor or lessor, without any express extension to heirs, executors, etc., is restricted to the person of the grantor or lessor, and the heir or executor cannot take advantage of it (c).—And for analogous reasons in an action of ejectment founded on a condition of re-entry, the burden of proving all the circumstances divesting the estate, though involving negative matter, is cast by law upon the person maintaining the forfeiture (d).

Condition of re-entry not extended to heirs unless mentioned.

Burden of proving forfeiture.

(a) *Edwards v. Hammond*, 1 B. & P. N. R. 324 n; see *Hawkins on Wills*, 240; *Bromfield v. Crowder*, 1 Bos. & P. N. R. 313; *Doe v. Moore*, 14 East, 601; *Phipps v. Ackers*, 9 Cl. & F. 591. See *Price v. Hall*, L. R. 5 Eq. 399, 37 L. J. C. 191; and see *post*, Chap. II. Sect. III. 'Executory Devise.'

Radford v. Willis, L. R. 7 Ch. 7; 41 L. J. C. 19, where a devise to an unmarried woman for life, with remainder to her husband, with a devise over if she died unmarried, was construed to vest the remainder indefeasibly in her first husband although he died before her; and the devise over was construed to take effect only if she never had been married.

(c) *Shepp. Touch.* 133.

(b) 8 Co. 90 b, *Fraunces' Case*; Co. Lit. 218 a, 219 b; *Sheppard Touch.* by Preston, 133; *Clavering v. Ellison*, 25 L. J. C. 274, 278; 29 Ib. 761; *Kiallmark v. Kiallmark*, 26 L. J. C. 1;

(d) *Doe v. Whitehead*, 8 A. & E. 571; *Toleman v. Portbury*, L. R. 5 Q. B. 288; 6 Ib. 245; 7 Ib. 344.

Condition
against assign-
ment determined
by licence.

According to the same principles a condition of entry in a lease upon assignment without licence is held at the common law not to be apportionable; and licence once given dispensed with the condition altogether, so that no subsequent alienation without licence could break the condition or give cause of entry to the lessor. And a licence given to assign to one particular person or in one particular instance had the same effect in dispensation and determination of the condition, as a licence given to assign generally (a).

Effect of licence
restricted by
statute.

But in this instance the Legislature has interfered to correct the construction, and by the statute 22 & Vict. c. 35, s. 1, it is enacted generally that "where a licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease or other matter thereby specifically authorized to be done but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence)—and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given except in respect of the particular matter authorized to be done." Section 2, restricts in like manner the operation of a licence to assign or underlet or do any other act given to one of several lessees, or given in respect of part of the property.

Waiver re-
stricted to the
specific instance
or breach
waived.

A waiver of a breach of the condition against assignment had the same effect as a licence in dispensation of the condition altogether (b); and to meet the

(a) *Dumpro's Case*, 4 Co. 119; 1 Smith L. C. 3rd ed. 15; *Brummel v. Macpherson*, 14 Ves. 173.
(b) 5 Taunt. 257, *Lloyd v. Cr*

and other cases of a like kind, it was enacted by the statute 23 & 24 Vict. c. 38 (Lord St. Leonards' Act), s. 6, that an actual waiver of the benefit of any covenant or condition in any lease proved to have taken place after the passing of the Act in any one particular instance "shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that instance or breach of covenant or condition to which such waiver shall specially relate; nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

The courts of law have been invested by various statutes with a summary jurisdiction to grant relief upon equitable principles against forfeitures for conditions broken:—in the case of mortgages by 7 Geo. III. c. 20, re-enacted by the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76,) s. 219 (a);—in the case of forfeiture for non-payment of rent by the C. L. P. Act, 1852, s. 212, and the C. L. P. Act, 1860, (23 & 24 Vict. c. 126,) s. 1; (b)—and in some cases of forfeiture for breach of covenants or conditions to insure against fire, by the C. L. P. Act, 1860, ss. 2, 3 (c).

Relief against conditions at law.

The courts of equity exercise an original jurisdiction in some cases to relieve against forfeiture at law for conditions broken upon the principle of compensation:—thus in mortgages equity relieves against a forfeiture at law by giving the equity of redemption (d);—and in case of forfeiture for non-payment of rent the court will relieve, subject to the requirements of the statute (e).

Relief in equity.

But the jurisdiction is exercised only in cases which admit of compensation; and the courts of equity will give no relief against forfeitures arising from breach of

(a) See Day's C. L. P. Acts, 3rd ed. p. 172.

(b) See *Ib.* p. 295.

(c) See *Ib.* p. 296.

(d) See *ante*, p. 232.

(e) 4 Geo. II. c. 28; 15 & 16 Vict. c. 76, s. 210, 211; see *Bowser v. Colley*, 1 Hare, 109; and notes to *Peachy v. Duke of Somerset*, 2 W. & T. L. C. 992, 3rd ed.

a condition not to assign without licence, or from breach of a covenant to repair, or to insure against fire, or the like specific matters (a). Courts of equity have now power to relieve against forfeiture for breach of covenant or condition to insure against fire, where no loss has happened, in cases of accident or mistake, but subject to certain conditions, by the statute 22 & 23 Vict. c. 35, ss. 4-8 (b).

The courts of equity have, in general, no jurisdiction to relieve against conditions imposed by a testator in his will; thus it was held that a gift was divested under a condition, though the person to whom it was given was not informed of the condition in time to comply with it (c).

The Judicature
Act.

The distinction between Courts of Law and Courts of Equity in regard to relief against forfeitures will be merged and cease by the provisions of the Supreme Court of Judicature Act, 1873, (36 & 37 Vict. c. 66, s. 24,) under which such relief will be afforded in all cases as has hitherto been given by the Court of Chancery.

(a) *Green v. Bridges*, 4 Sim. 96; *Gregory v. Wilson*, 9 Hare, 683; see notes to *Peachy v. Duke of Somerset*, 2 W. & T. L. C. 992, 3rd ed.

(b) See *Page v. Bennett*, 2 Giff. 117; 29 L. J. C. 398.

(c) *Hodges' Legacy*, L. R. 16 Eq. 92; 42 L. J. C. 452; *Powell v. Rawle*, L. R. 18 Eq. 243; see *Dawson v. Dawson*, 8 Sim. 346; *Hawkes v. Baldwin*, 9 Sim. 355; *Burgess v. Robinson*, 3 Mer. 7.

SECTION VII. EQUITABLE ESTATES AND INTERESTS IN LAND.

- § 1.—Equitable estates corresponding to legal estates.
- § 2.—Trusts for conversion.
- § 3.—Charges of money upon land.
- § 4.—Mortgages.
- § 5.—Equitable estates and interests arising out of contracts of sale.

§ 1. EQUITABLE ESTATES CORRESPONDING TO LEGAL ESTATES.

Equitable estates corresponding to legal estates—created by express limitation—by construction of equity.

Executory trusts—exceptional construction of the limitations—examples in marriage articles—in wills.

Equitable rights to property arising from fraud, mistake, etc. distinguished from equitable estates.

Equitable estates and interests either correspond with legal estates or are of kinds peculiar to equity, having no analogy in law. The former are treated in the first sub-section of this section; the latter form the matter of the following sub-sections.

Equitable estates which correspond with legal estates comprise estates in fee simple and fee tail, estates for terms of life and for terms of years, in strict analogy to the legal estates already described. They are created either by express limitation or by construction of equity,—either by declared or by constructive trust (*a*). Equitable estates corresponding to legal estates.

In the express limitation of equitable estates corresponding with legal estates, as regards the quantity of estate, equity, in general, follows the law; the same terms of limitation are used, and receive the same construction as in limiting estates at law (*b*). Arising by express limitation.

(*a*) See *ante*, pp. 131, 139.

(*b*) *Ante*, p. 139.

Arising by construction of equity.

But the rules of limitation apply only to express declarations of trust, and have no application to those equitable estates, which, though corresponding with legal estates, arise by construction of equity. Such are the constructive trusts or equitable estates and interests based upon the payment of the consideration of a purchase,—or which arise from a mere contract to purchase,—or resulting trusts which arise upon a legal conveyance not disposing of the whole equitable interest, or failing in effect to dispose of it (a).

Trusts and equitable estates thus arising are, for the most part, measured and limited by the legal estates and interests on which they are imposed. Thus, the equitable estate attributed to the payment of a consideration is co-extensive with the legal estate to which it is referred;—so a resulting trust includes the whole undisposed of estate to which it applies;—so by a contract of sale which equity would specifically enforce the purchaser may acquire an equitable estate in fee or other the whole interest which the vendor contracts to sell without any technical limitation (b).

Executory trusts.

Executory trusts are special or active trusts directing the trustee to settle or dispose of the land for the estates and interests required by the trust; they are so called because they have to be executed by a deed conveying the land for the estates and limitations intended, as distinguished from trusts directing the trustee to hold the property upon trusts then executed, in the sense of being then perfectly limited and defined. Executory trusts are fulfilled and discharged by the execution of a deed in conformity with the directions of the trust (c).

(a) See *ante*, pp. 133, 135.

(b) *Ib.*; 1 Co. 100 b; see *Bower v. Cooper*, 2 Hare, 408.

(c) *Fearne*, C. R. 136–148; 1 *Sanders on Uses*, 310; 1 *Spence*, Eq. Jur. 525; 2 *Ib.* 130; *Lord*

Glenorchy v. Bosville. 1 White & T. L. C. 1; *West v. Lord Holmesdale*, L. R. 4 H. L. 543; 39 L. J. C. 505; see *per Eldon*, L.C., as to the inaccuracy of the expressions, *executory* and *executed* trusts, 1 J.

Executory trusts are here distinguished, as regards the limitation of estates, by admitting of an exceptional construction of the limitations expressed. They are often expressed in compendious terms by way of instructions for the limitations directed to be made, without setting out the limitations at length, as by directing or agreeing that property shall be settled "in strict settlement," "entailed," settled "with usual or proper powers," or the like; in which cases the construction consists in developing the limitations involved in such expressions in the form best suited to carry out the general intention of the trust (a).

Construction of the limitations in executory trusts.

And even where an executory trust is expressed in technical terms of limitation, the terms are not necessarily construed with the same strictness as is applied to ordinary legal limitations; but, having regard to the directory character of the trust, the technical meaning is held subordinate to the general object required to be carried out (b).

Technical terms of limitation.

Upon this principle the Court refuses to apply the rule in *Shelley's* case to the limitations of an executory settlement, expressing that the estate is to be settled on the parent for life with remainder to the issue or heirs of the body, (which, if construed by that rule, would give the parent an estate tail, with absolute control over the property,) if it appear to be an object of the settlement to

& W. 570, in *Jervoise v. Duke Northumberland*. The word "directory" has been suggested instead of "executory." See 2 Spence, Eq. Jur. 131.

(a) See the notes to *Lord Glenorchy v. Bosville*, 1 W. & T. L. C. 18; *Stanley v. Colthurst*, L. R. 10 Eq. 259; 39 L. J. C. 650; *Loch v. Bagley*, L. R. 4. Eq. 122; *Magrath v. Morehead*, L. R. 12 Eq. 491; 41 L. J. C. 120; *Munt v. Glynes*, 41 L. J. C. 639; as to the construction of executory trusts in wills, see 2 Jarman on Wills, 252.

(b) 1 W. & T. L. C. 21, 26; as

to how far the limitations expressed by way of executory trust are to be taken as final or as admitting constructive modification, see the observations of Lord St. Leonards in *Egerton v. Brownlow*, 23 L. J. C. 348, 406; and see 2 Spence, Eq. Jur. 130; trusts which are not declared as executory cannot be so treated by reason of the added words "as near thereto as the rules of law and equity will permit." See *Christie v. Gosling*, L. R. 1 H. L. 279; 35 L. J. C. 667; *Harrington v. Harrington*, L. R. 5 H. L. 87, 107; 40 L. J. C. 716.

secure a provision to the issue ; for the application of the rule would defeat that object (*a*).

Executory trusts
in marriage
articles.

Instances of executory trusts occur in marriage articles, agreeing that a settlement shall be made upon an intended marriage (*b*). A covenant in marriage articles by the intended husband "to settle an estate upon his issue" of the marriage, was construed to require successive estates tail to the children of the marriage after a life estate in the husband, but not to admit of portions for younger children (*c*).

Executory trusts
in wills.

Instances of executory trusts occur also in wills leaving property to trustees with directions for future settlement (*d*). In a recent case, a will directed property to be settled "in a course of entail to correspond" to the limitations of a peerage, which limitations were to a person and the heirs male of his body, importing, as applied to land, an estate tail male ; the Court decreed the settlement to be made to the person for life with remainders to his sons successively in tail male, upon the ground that as the peerage was inalienable, and the intention was that the property should follow the peerage, such limitations would more nearly correspond in effect with the limitation of the peerage than a limitation in the identical terms, which would give him an estate tail, and thereby enable him to defeat the settlement (*e*).

Equitable rights
to property
arising from
fraud, etc.

It seems necessary here to notice, for the purpose of distinguishing them, those equitable rights to the re-

(*a*) Fearn, C. R. 90, 114 ; 2 Jarman on Wills, 252 ; 2 Spence, Eq. Jur. 130, where see as to the distinction between marriage articles and wills in regard to the object of providing for issue. *Stonor v. Curwen*, 5 Sim. 264.

(*b*) 1 W. & T. L. C. 21, notes to *Glenorchy v. Bosville*, 2 Spence, Eq. Jur. 130

(*c*) *Grier v. Grier*, L. R. 5 H. L. 688.

(*d*) 1 W. & T. L. C. 26, notes to *Glenorchy v. Bosville* ; 2 Jarman on Wills, 252 ; 2 Spence, Eq. Jur. 130.

(*e*) *West v. Holmesdale*, L. R. 4 H. L. 543 ; 40 L. J. C. 795 ; see another recent example in *Thompson v. Fisher*, L. R. 10 Eq. 207 ; and see cases of executory trusts of personality to be settled by reference to settlements of realty. 1 W. & T. L. C. 25, 32,

covery of property which are not founded in any trust, strictly so called, either express or constructive. Such rights arise where the legal estate is acquired or retained under circumstances against conscience and equity, which a court of equity will redress;—as the right to cancel a conveyance obtained by fraud and have a re-conveyance, —the right to correct mistakes, and the like.

“The jurisdiction of the Court of Chancery in regard to specific property, ranges itself under two great heads or divisions;—in the cases which range themselves under the first division, the Court recognises and preserves a legal estate or title, as well as an equitable title; indeed, in most cases, the legal estate or interest has been devised or conveyed to the person in whom it is vested expressly for the purposes of the trust, and the legal title is only so far interfered with as to make it subservient to the enjoyment of the co-existent equitable interests,—the cases which range themselves under the second division, are those in which the legal title has not been conveyed to the party in whom it is vested by way of trust, but has been acquired, or is retained against conscience and equity; and the equitable doctrines which govern this branch of the jurisdiction are put in force for the purpose of having the legal title to the property transferred to the person who, according to honesty and conscience, in the view of the Court of Chancery, is entitled to the property. There is no object to be attained, as in the cases which come under the first division, which requires that the legal estate shall be kept outstanding: the claimant seeks to enforce an equitable *right*, not to secure an equitable *estate*: so that the doctrine of constructive trusts is applied in these cases only for the purpose of effecting an immediate transfer of the beneficial interest to the person who is entitled in equity to the legal interest” (a).

The rights here referred to form an important branch of the *remedial* jurisdiction of equity, giving specific re-

Distinguished from equitable estates.

The remedial jurisdiction of equity.

(a) 2 Spence, Equitable Jur. 1, 2.

dress in cases of fraud, mistake, and the like, upon equitable principles ; but they do not enter into the scope of the present work, which is restricted to the substantive law and does not refer to the occasions and remedies of infringements or wrongs further than may be sometimes necessary or useful to do so for the purpose of explanation (a).

§ 2. TRUSTS FOR CONVERSION.

Trusts for conversion— of land into money — of money into land.

Absolute conversion — conditional conversion — discretion of trustees.

Resulting interest under a conversion by deed is personal estate— where the whole interest results there is no conversion.

Proceeds of conversion by will, undisposed of, results to the heir —when included in residuary bequest—in residuary devise —heir takes the proceeds as personalty, unless conversion unnecessary.

Election against conversion — election by owner of share—by tenant in tail—what constitutes election.

Conversion of real estate of partnership.

Estates and interests peculiar to equity.

In this and the following sub-sections are treated those equitable estates and interests in land which are peculiar to equity, not only in respect of the mode of creating them, but also in respect of the kind and quality of the interest, and which have no correspondence with legal estates (b).

Trusts for conversion.

By the equitable doctrine of conversion, concisely stated as follows,—“money directed to be employed in the purchase of land, and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted ; and this in whatever manner the direction is given ; whether by will, by way of contract, marriage

(a) See *ante*, p. 135.

(b) See *ante*, p. 243.

articles, settlement, or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money or money land " (a).

Thus by means of a trust to sell land and convert it into money, the equitable interest becomes immediately, and though the land remains unsold, personal estate. It is subject to the rules of limitation, and of transmission and distribution proper to that class of property (b).

So, a trust to lay out money in the purchase of land has an immediate effect in equity, although the trust remains unexecuted, in converting the beneficial interest into real estate. It becomes capable of all the estates and limitations, is subject to the same incidents, and is transmissible according to the same rules as an equitable estate in land (c). Trusts for conversion of money into land belong to the law of personal property, and are therefore not here further noticed.

The conversion takes effect according to the terms prescribed in the trust. If the trust is in terms absolute the conversion takes effect from the execution of the deed declaring the trust (d),—or, if created by will, from the death of the testator (e).

If the trust is discretionary, or to be executed at a future date, or with the consent of certain parties, or upon certain other events and conditions, there is no conversion until and except so far as the discretion is properly exercised, or the time has elapsed, or the required consents have been given, or other conditions

(a) *Per* Sewell, M. R., in *Fletcher v. Ashburner*, 1 Bro. C. & C. 497; 1 W. & T. L. C. 741; as to contracts of sale, see *post*, p. 306.

(b) *Ib.*

(c) *Fletcher v. Ashburner*, *supra*; and see 1 Sanders on Uses, 298, 300; 1 Jarman on Wills, 524; see *re De Lancey*, L. R. 4 Ex. 345, 352,

358; 7 *Ib.* 140, 142.

(d) *Griffiths v. Rickett*, 7 Hare, 299; *Clarke v. Franklin*, 4 K. & J. 257; 27 L. J. C. 567.

(e) *Beauclerk v. Mead*, 2 Atk. 167; *Ward v. Arch*, 15 Sim. 389; *Robinson v. Robinson*, 19 Beav. 495. See *Spencer v. Wilson*, L. R. 16 Eq. 501; 42 L. J. C. 754.

satisfied; and the beneficiaries until the conversion take the property in its actual state (*a*).

Conversion at discretion of trustees.

The conversion may be absolute and immediate, as to the disposition of the property, but with a discretion in the trustees as to the time of selling (*b*). The court will not control a discretion given to trustees for the purpose of conversion (*c*).

Resulting interest under a conversion by deed.

Where a deed conveys land upon an absolute trust for conversion, for purposes which do not extend to the whole proceeds, or which partially fail of effect, the undisposed of interest in the proceeds results to the grantor according to the general doctrine of resulting trusts (*d*). But the deed operates as a conversion from the time of execution, and the resulting interest in the grantor is affected with the converted quality of personal estate, and therefore in case of his death, though before the execution of the trusts, it passes to his executor as personal estate and not to his heir (*e*). And in such case it is immaterial that the deed be made revocable, if it has not in fact been revoked (*f*).

(*a*) 1 W. & T. L. C. 758, in notes to *Fletcher v. Ashburner*; *Townley v. Bedwell*, 14 Ves. 591; *Walter v. Maunde*, 19 Ves. 424; *Bourne v. Bourne*, 2 Hare, 35; *Ibbittson's Estate*, L. R. 7 Eq. 226; *Atwell v. Atwell*, L. R. 13 Eq. 23; 41 L. J. C. 23. As to conversion at grant of a purchaser, see *post*, p. 307.

(*b*) *Flint v. Warren*, 16 Simon, 127; *Robinson v. Robinson*, 19 Beav. 495; *Miller v. Miller*, L. R. 13 Eq. 263; 41 L. J. C. 291.

(*c*) See 1 W. & T. L. C. 758, notes to *Fletcher v. Ashburner*.

(*d*) See *ante*, p. 135.

(*e*) See 1 W. & T. L. C. 802, notes to *Ackroyd v. Smithson*; *Hewitt v. Wright*, 1 Bro. C. C. 86; *Van v. Barnett*, 19 Ves. 102; *Griffith v. Ricketts*, 7 Hare, 299; *Clarke v. Franklin*, 4 K. & J. 257; 27 L. J. C. 567. "If the author of the

deed impresses upon his real estate the character of personalty, that, as between his real and personal representatives, makes it personal and not real estate from the delivery of the deed, and consequently at the time of his death. The deed thus altering the actual character of the property, is, so to speak, equivalent to a gift of the expectancy of the heir-at-law to the personal estate of the author of the deed.—And there is no principle on which the court, as between the real and personal representatives, (between whom there is confessedly no equity,) should not be governed by the simple effect of the deed in deciding to which of the two claimants the surplus belongs." *Per* Wigram, V.C., *Griffiths v. Ricketts*, *supra*.

(*f*) *Griffith v. Ricketts*, *supra*.

If however the whole purpose of the conversion were to fail altogether, the direction for conversion would be taken to fail with it; the trust would not attach, and the property would result to the grantor in its original quality of real estate (a).

Where whole interest results, no conversion.

Different considerations arise under a will as to the destination of the undisposed of proceeds of a trust for conversion. The will does not operate until the death of the testator, and whatever is deemed real estate at the time of his death *prima facie* belongs to his heir. A trust for conversion may alter the character of the property which he takes as heir, but unless it be given away to some other person his title as heir will prevail. The conversion is presumed to be for the purposes of the will only and no further, and implies no gift or preference of the next of kin; "the heir is excluded, not by the direction to convert, but by the disposition of the converted property, and so far only as that disposition extends" (b).

Undisposed of proceeds of conversion by will, passes to heir.

Accordingly, where a testator devised real estate upon trust for conversion, with the further direction that the proceeds of the real estate should be "part of the personal estate," it was held that the heir was entitled to the surplus proceeds after satisfying all the purposes of the will (c).—And where the will declared that the proceeds of

Conversion is for the purpose of the will only.

(a) See 7 Ves. 435, *Ripley v. Waterworth*; *Clarke v. Franklin*, supra.

(b) 1 Jarman on Wills, 553; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; 1 W. & T. L. C. 783, notes, lb.; *Jessopp v. Watson*, 1 M. & K. 665; *Eyre v. Marsden*, 2 Keen, 564; *Spencer v. Wilson*, 42 L. J. C. 754; L. R. 16 Eq. 501. "A contemporaneous declaration that his real estate shall be turned into personalty may alter the character of the property which the heir-at-law takes, but unless it be given away from the heir, there is no reason why he should not take it,

although the trusts of the will may oblige him to take it as personal estate and not as real estate." *Per* Wigram, V.C., in *Griffith v. Ricketts*, 7 Hare, 311; and see 1 Jarman on Wills, 558. Conversely, if personal estate be bequeathed upon trust for conversion into land, any interest undisposed of or disposed of in a manner which fails results to the next of kin of the testator and not to his heir. *Simmons v. Pitt*, L. R. 8 Ch. 978; 43 L. J. C. 267.

(c) *Gordon v. Atkinson*, 1 De G. & S. 478; *Flint v. Warren*, 16 Simon, 124, where the V. C. said, "As it is not given away, there is nothing

the conversion should be "a fund of personal and not of real estate, for which purpose such proceeds or any part thereof shall not in any event lapse or result for the benefit of the heir at law," it was held that there was no implied gift to the next of kin, and therefore the proceeds undisposed of by the will must result to the heir. Such expressions, it was said, excluded the heir only for the purposes of the will; and that an intention to exclude the heir altogether would be void of effect without a gift to some one else (a).

Proceeds of conversion do not pass under residuary bequest.

Unless expressly included in the personalty.

The conversion being presumptively for the purposes expressed in the will only, the undisposed of proceeds of a trust for conversion will not, in general, pass under a general or residuary bequest of the personal estate. But if the trust for conversion be accompanied with a direction that the proceeds shall be considered as "part of the personal estate," or any equivalent direction blending the funds, it will then be included in a residuary bequest (b). Accordingly, where the testator, after giving all his real and personal estate to trustees to convert into money for the purpose of paying certain legacies, etc., directed his trustees to hold "the residue of his said personal estate so converted into money" upon trust for certain persons, it was held that the residuary clause included all the proceeds of the real estate and gave it away from the heir (c).

Proceeds of conversion pass under residuary devise.

A general or residuary devise will include the proceeds of a trust for conversion which the testator does not express himself as disposing of otherwise. In wills made before 1st Jan. 1838, (to which the Wills Act does not extend,) a residuary devise is construed with reference

to take it from the heir, and I am bound to say that the heir is entitled to it."

(a) *Fitch v. Weber*, 6 Hare, 145; *Robinson v. London Hospital*, 10 Hare, 19; 22 L. J. C. 754. See a trust for conversion with bequest of the proceeds to the personal

representatives. *Holloway v. Radcliffe*, 23 Beav. 163; 26 L. J. C. 401.

(b) 1 Jarman on Wills. 562, 566; *Byam v. Muntton*, 1 Russ. & M. 503.

(c) *Spencer v. Wilson*, L. R. 16 Eq. 501; 42 L. J. C. 754; see *Mutlow v. Bigg*, L. R. 18 Eq. 246.

only to the property of the testator at the time of making his will and is restricted to such specific estates and interests as the will does not purport to dispose of; consequently under such wills the estates and interests comprised in dispositions which fail in effect by lapse or otherwise are not included in a residuary devise, but result to the heir.—But by the Wills Act, 1 Vict. c. 26, s. 25, it is enacted, “that unless a contrary intention shall appear by the will, such real estate or interest therein, as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail, or be void, by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will” (a).

If a sale is obligatory or necessary for the purposes of the trust, this interest in the proceeds comes to the heir or the residuary devisee in its converted quality of personal estate and is transmissible accordingly; but, if a sale is not obligatory or necessary, he takes it as real estate descendible to his heirs. Nor will an actual sale, if unnecessarily made, alter the quality of the property for the purpose of transmission (b).

(a) *Carter v. Haswell*, 26 L. J. C. 576; 3 Jur. N. S. 788; see 1 Jarman on Wills, 587; 1 W. & T. L. C. 811, notes to *Ackroyd v. Smithson*, and see *post*, Part IV. Chap. II. ‘Disposition by Will.’

(b) *Smith v. Claxton*, 4 Madd. 484; *Jessopp v. Watson*, 1 My. & K. 665; 1 W. & T. L. C. 801, notes to *Ackroyd v. Smithson*; 1 Jarman on Wills, 568. As to a sale by order of Court, see *Steed v. Preece*, L. R. 18 Eq. 192. The liability to probate duty follows, in general, the doctrine of conversion, although the heir become entitled, and although the land remain unsold. *Att.-Gen. v. Lomas*, L. R. 9 Ex. 29; 43 L. J. Ex. 32; *Att.-Gen. v.*

Bunning, 8 H. L. C. 243; 30 L. J. Ex. 379; as to legacy duty see *Forbes v. Steven*, L. R. 10 Eq. 178; 39 L. J. C. 485; and as to succession duty see *De Lancey’s Succession*, L. R. 4 Ex. 345, 7 Ib. 140; 38 L. J. Ex. 193; 39 Ib. 76; and see the Succession Duty Act, 16 & 17 Vict. c. 51, s. 29.—In *Att.-Gen. v. Lomas*, supra, the law was stated with the concurrence of the court, that “If the land remains unconverted at the time when the heir who takes an undisposed of interest in it dies, and if there is nothing in the will making it necessary to convert it, it is taken as land, and devolves according to the rules governing the descent of real estate; but when there is a

Heir or residuary devisee takes the proceeds as personalty.

Election against
conversion.

The person becoming absolutely entitled to the beneficial interest in the property under a trust for conversion may interpose to prevent the actual conversion and elect to take the property in its existing state. This doctrine has been stated as follows:—"A court of equity inquires, for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest in the thing which is the subject of it; and therefore, where money is given to be laid out in land which is to be conveyed to A., though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out; so, on the other hand, where land is given upon trust to sell, and to pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner, and the trustee must convey as he shall direct. If there are also other purposes, for which it is to be sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes; and if he provides for them, he may keep the estate unsold" (a)

Election by
owner of share
of proceeds.

A person entitled to a share only in the proceeds of the sale of land under a trust for conversion cannot alone, and without the consent of the persons entitled to the other shares, elect to take his share as real estate, or prevent the sale either as to a specific part of the land or as to an undivided share; for by so doing he would affect the sale of the other part or shares (b). But a person entitled to a share in money directed to be laid out in

legal obligation to sell, and the proceeds are to form a portion of a joint and single fund for the purposes of the will, then whatever may be the condition of the property, at the time of the death of the heir taking the undisposed of interest, it is, both for the purpose of devolution and for the purpose of probate duty, to be considered as money.—When the character of the property is changed by the positive

direction of the will, the crown is entitled to both probate and legacy duty by virtue of the character so impressed on the property."

(a) *Per Grant*, M. R., 17 Ves. 104, *Pearson v. Lane*; and see 1 W. & T. L. C. 776, in notes to *Fletcher v. Ashburner*.

(b) *Trower v. Knightley*, 6 Madd. 134; *Holloway v. Radcliffe*, 23 Beav. 163; 26 L. J. C. 401. 1 Jarman on Wills, 536.

land, may, in general, elect to take his share in money leaving the trust to operate upon the balance only (a).

A tenant in tail under a trust for conversion of money into land may acquire the absolute interest by means of a disentailing assurance and elect to take the money (b). Where land has been taken under the compulsory powers of a railway company, and the purchase money paid into court, the money in the hands of the court is considered as impressed with the trusts and quality of the land; but the money may be paid out to a tenant in tail without his executing a disentailing deed (c).

The election against conversion may be made by express declaration of the intention to take the property in its existing state, or by acts from which the court would presume such intention; and slight circumstances are sufficient to raise the presumption of an election (d). Taking possession of the estates and of the title deeds by the person who had become absolute owner was held to be an election to take the property as land and to put an end to the trust for conversion (e).—Devising the property as land is an election to transmit it in that form (f).—So, bequeathing a sum as money, which is under trust for conversion into land, fixes it with the character of personalty (g).

But the testator in such cases must refer to the property and show his intention to determine its quality; money impressed with a trust for conversion into land will not pass under a general bequest of personalty. “It is not the actual state of the fund but the state in which

(a) *Seeley v. Jago*, 1 P. Wms. 389; *Walker v. Denn*, 2 Ves. Jun. 170.

(b) *Pearson v. Lane*, 17 Ves. 101; and see 3 & 4 Will. IV. c. 74, s. 71; *post*, Part IV. Chap. I.

(c) *Re Row*, L. R. 17. Eq. 300; 43 L. J. C. 347; see *Stewart's Trusts*, 1 S. & G. 32; 22 L. J. C. 369. As to a sale by order of Court, see *Steed v. Preece*, L. R. 18 Eq. 192.

(d) 1 W. & T. L. C. 779, in notes to *Fletcher v. Ashburner*, and the cases there cited; 1 Jarman on Wills, 534.

(e) *Davies v. Ashford*, 15 Sim. 42.

(f) *Sharp v. St. Sauveur*, L. R. 7 Ch. 343; 41 L. J. C. 576.

(g) *Pulteney v. Darlington*, 1 Bro. C. C. 235; see *Lucas v. Jones*, L. R. 4 Eq. 73; 36 L. J. C. 602.

it ought to be which governs the case, unless some act be done declaratory of the intention that it should be changed" (a).

Conversion of
real estate of
partnership.

A common application of the doctrine of conversion occurs with land becoming part of a partnership property. The contract of partnership imports, in the absence of stipulation to the contrary, an agreement that upon a dissolution all the property shall be sold for the purpose (after liquidating the partnership debts) of division between the partners in their respective shares. Hence land under such agreement for sale, as being partnership property, is considered in equity as regards the interests of the partners, to be personal estate; and upon the death of a partner his share will pass to his personal representative and not to his heir (b).

But it is competent for the partners to agree that the land, though used for partnership purposes, should be held by them specifically as real estate, and that there should be no conversion, and they may settle the land accordingly; the share or estate of the deceased partner

(a) *Gillies v. Longlands*, 4 D. & S. 372; 20 L. J. C. 441. *Stewart's Trusts*, 1 S. & G. 32; 22 L. J. C. 369.

(b) 1 W. & T. L. C. 162, 174, in notes to *Lake v. Gibson*, and *Lake v. Craddock*; Dixon on Partnership, p. 68; 1 Lindley on Partn. 667, 2nd ed.; *Waterer v. Waterer*, L. R. 15 Eq. 402; "The principle is that on the dissolution of the partnership all the property belonging to the partnership shall be sold and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners, according to their respective shares in the capital. That is the general rule; it requires no special stipulation; it is inherent in the very contract of partnership.

—Then any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that not merely as between the partners to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner." *Per* Kindersley, V.C., in *Darby v. Darby*, 3 Drew. 495, 503; 25 L. J. C. 371, adopted by the court in L. R. 4 Ch. 609, *Steward v. Blakeway*, and in L. R. 10 Eq. 188, *Forbes v. Steven*.—The share of a deceased partner in the real assets of the partnership is liable to probate and legacy duty as personal estate. *Forbes v. Steven*, L. R. 10 Eq. 178; 39 L. J. C. 485.

will then be transmissible to his heir, or according to the form of the settlement (a).

§ 3. CHARGES OF MONEY UPON LAND.

Charges of money for portions—debts—legacies—mortgages.

Charge of debts by deed—trust for debtor—for creditors.

Charge of debts by will—implied from general direction to pay debts.

Charge of debts creates equitable assets—distinction between legal and equitable assets—creditors having priority against legal assets postponed in equity.

Land formerly not assets unless charged by will—remedies for specialty debts binding the heirs—extended against devisees.

Land not charged by will made equitable assets by 3 & 4 Will. IV. c. 104—priority of specialty debts—abolished by 32 & 33 Vict. c. 46—effect of 3 & 4 Will. IV. c. 104, in charging the land.

Specific devise exonerates land as against the heir or residuary devisee—charge upon specific real estate in exoneration of residue.

Charge of debts upon real in exoneration of personal estate—charge upon mixed fund rateably—preferential charges not binding against creditors.

Charge of legacies on real estate—in aid of personal estate—on real and personal estate rateably—on real estate exclusively—as against devisees—charge of legacies implied from residuary gift.

Interest upon charges—of debts—of legacies.

Power to raise charges—statutory power in devisee or executor.

Power to raise charge by sale or mortgage—by “rents & profits”—charges of annuities.

Power to discharge by receipts—express—implied—power in executors—statutory power in trustees.

Under the general doctrine of conversion, land may be impressed with a trust for raising a certain sum of ^{Charges of money upon} land.

(a) *Steward v. Blakeway*, *supra*; *Custance v. Bradshaw*, 4 Hare, 315, *supra*. In which case also the property will not be liable to probate or legacy duty. as explained in *Forbes v. Steven*,

money, or a sum required for certain specified purposes. Such a charge operates as a conversion and alienation *pro tanto*; but it does not interfere with the limitation and disposal of the land, as real estate, subject to the charge.

For portions.

Charges of this kind are used to provide portions for children in family settlements made on marriage. The ordinary mode of making the charge for this purpose is by vesting a long term of years in trustees upon trust to raise the intended portions or charges, when required, by sale or mortgage or by receipt of the rents and profits (*a*). The law of portions relates chiefly to the times of vesting and payment, that is, to the limitation of portions as future interests, and therefore belongs more appropriately to the next chapter on "The limitation of Future Estates" (*b*).

For debts and legacies.

Charges of money upon land are also used for the payment of debts; and they may be created for this purpose by deed or by will;—they are also of common use in wills for the payment of legacies. Mortgages also are a special form of charge in common use for securing debts upon land.—These forms of charges will here be considered (*c*).

Mortgages.

Charge of debts
—by deed.

A deed conveying land to a trustee for the payment of the debts of the grantor, to which the creditors are not parties, does not alone raise a trust for the creditors. It creates an agency or trust on behalf of the grantor himself only, which is voluntary and revocable (*d*). But if communicated to the creditors and assented to by

Trust for
grantor.
Trust for credi-
tors.

(*a*) 2 Hayes Conv. 61; 2 Prideaux Conv. 281; 2 Spence, Eq. Jur. 390; see *ante*, p. 221.

(*b*) See *post*, Chap. II. Sect. VI; where see also as to the doctrine of satisfaction of portions by advancement before the time of payment.

(*c*) See §. 4. 'Mortgages,' *post*, p. 278.

(*d*) 1 W. & T. L. C. 333, notes to *Ellison v. Ellison*; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Walwyn v. Coutts*, 3 Mer. 707; *Acton v. Woodgate*, 2 M. & K. 495; see *Griffith v. Ricketts*, 7 Hare, 299; 19 L. J. C. 100; *Glegg v. Rees*, 41 L. J. C. 243; L. R. 7 Ch. 71.

them, it may then create a valid trust in their favour (a).

“A voluntary conveyance of property upon trust to pay creditors, not parties to the transaction, has been very reasonably held to create a trust for the author of the deed, and not for his creditors.—On the other hand, it is equally clear that a voluntary conveyance of property to trustees upon trust for a third party, may create an indefeasible trust in favour of that party. The difference in principle between the two classes of cases is marked and obvious; but to decide to which of the two classes a given trust deed belongs is often a task of difficulty; it depends upon the intention of the author of the deed, to be collected from the deed itself, and such surrounding circumstances as may be admissible in aid of the interpretation of the deed” (b).

A charge of debts may be created by will by a devise of the land upon express trust for payment of debts, or by a mere charge of the debts upon certain land or upon all the real estate of the testator, whether devised or left to descend (c).

A general direction in a will that the testator's debts shall be paid is an implied charge in equity upon all the real estate of the testator, unless a clear intention appear of restricting such direction to a particular fund; as is held to appear by a direction to the *executor* to pay the debts, which presumptively applies only to the assets taken by the executor, and the property, if any, devised to him (d).

(a) See *Ib.*; *Harland v. Binks*, 15 Q. B. 713.

(b) *Per* Wigram, V.C., *Griffith v. Ricketts*, 7 Hare, 299, 308; and see 2 Spence, Eq. Jur. 58, 350; see *Ib.* 348 on ‘Trust deeds for payment of debts.’

(c) “A mere charge is no legal interest; it is not a devise to any one but that declaration of inten-

tion, upon which a Court of Equity will fasten, and by virtue of which will draw out of the mass going to the heir or to others that *quantum* of interest, which will be sufficient for the debts” *Per* Eldon, L. C., 7 Ves. 323, *Bailey v. Ekins*.

(d) 2 Jarman on Wills, c. 45; Hawkins on Wills, 282; 2 Spence, Eq. Jur. 320; 2 W. & T. L. C.

Charge of debts by will.

Implied from general direction to pay debts.

Charge of debts
creates equitable
assets.

A devise of land for payment of debts, or a general charge of debts renders the land affected equitable assets; which, as distinguished from legal assets administered by the executor to the creditors in order of legal priority, are administered amongst all creditors equally, whether creditors by judgment, specialty or simple contract, those creditors only having priority, who, like mortgagees, have specific charges upon the land independently of the will (*a*).—Though the same person may be executor as well as trustee for payment of debts, the trust of the land is to be administered in the latter capacity only, and the debts paid equally according to the rule of equity, and not according to their legal priority (*b*).

Legal assets.

It may be observed that the personal estate of the deceased, including all the estate which passes to the executor by right of his office, and known as *legal assets*, is the fund primarily charged with debts both at law and in equity, and is administered in the same order in equity as at law (*c*).

Distinction
between legal
and equitable
assets.

The distinction between legal and equitable assets depends upon the nature of the remedy of the creditor against the estate, not upon the nature of the remedy of

114, notes to *Silk v. Prime*; *Clifford v. Lewis*, 6 Madd. 33; *Wrigley v. Sykes*, 21 Beav. 337; 25 L. J. C. 458; *Cook v. Dawson*, 3 D. F. & J. 127; 30 L. J. C. 311, 359. So, "The words 'after payment of my debts' mean, that he will not give anything until his debts are paid. He could not help paying his debts out of his personal estate; therefore, to give those words any effect they must charge the real estate. Wherever a testator says he wills that his debts shall be paid, that will ride over every disposition, either as against his heir-at-law or devisee and the words 'after my debts paid' mean the same thing." *Per Arden*, *M. R. Shallcross v. Finden*, 3 Ves. 733.

(a) 2 W. & T. L. C. 119, 123,

notes to *Silk v. Prime*; *Bailey v. Ekins*, 7 Ves. 319; *Shiphard v. Lutwidge*, 8 Ves. 26.

(b) *Silk v. Prime*, 2 W. & T. L. C. 95, and notes, *Ib. Clay v. Willis*, 1 B. & C. 364; *Barker v. May*, 9 B. & C. 489; as executor he cannot retain for his own debt out of the proceeds of the land, as he can out of the legal assets. *Bain v. Sadler*, *supra*.

(c) *Wms. Ex.* 4th ed. 848; 5th ed. 890, where see as to the priority of debts or order of payment in administering legal assets. But as to debts charged upon land by way of mortgage, the law has been altered by *Locke King's Act*, 17 & 18 Vict. c. 113, and the land so charged is made primarily liable. See *post*, p. 287.

the executor on behalf of the estate. Thus, whatever property the personal representative can recover *virtute officii*, though by means of a suit in equity only, is included in the legal assets; which the creditor can charge against him by proceeding in a court of law. And whatever cannot be reached through the executor, but is available to the creditor by means of proceedings in equity only, constitutes *equitable assets* (a).

Accordingly a charge of money upon land, being personal estate, is recoverable by the executor *virtute officii*, though in equity only, and is administered as legal assets (b).—"The portions of younger children charged on the family estate are generally only recoverable in equity, but they are certainly legal, not equitable assets."—"So money due to a mortgagee in fee, where the mortgagee is not a creditor by covenant or otherwise, and where therefore there is no legal remedy" (c).—So, the equity of redemption in a mortgage of chattels real (d).—And the purchase money of land under a contract of sale not completed at the vendor's death constitutes legal assets, though recoverable only by suit in equity, the remedy on the contract at law being merely for damages (e).

In the administration of legal assets a creditor may in some cases obtain a preference; thus, the executor may pay one creditor before another of equal degree; also the executor may retain for his own debt. But, in case of a deficiency of assets, the creditor who has obtained such preference is not allowed any claim against equitable assets until the other creditors have been brought to equality with him by payment of their debts to a proportionate amount (f).

(a) *Cook v. Gregson*, 3 Drew. 547, 25 L. J. C. 706; *Att.-Gen. v. Brunning*, 8 H. L. C. 243, 30 L. J. Ex. 379.

(b) *Cook v. Gregson*, 3 Drew. 547; 25 L. J. C. 706.

(c) *Per* L. Cranworth, *Att.-Gen. v. Brunning*, 8 H. L. C. 243, 30 L. J. Ex. 379.

(d) *Per* Kindersley, V. C. *Cook*

v. Gregson, *supra*.

(e) See *Att.-Gen. v. Brunning*, *supra*.

(f) 2 W. & T. L. C. 123, notes to *Silk v. Prime*; *Soames v. Robinson*, 1 M. & K. 500; *Earl Vane v. Rigden*, L. R. 5 Ch. 663; 39 L. J. C. 797; *Bain v. Sadler*, L. R. 12 Eq. 570; 40 L. J. C. 491. On the principle of marshalling the assets,

Priority at law corrected in equity.

Land formerly
not assets unless
charged by will.

The real estate of a deceased person, until a recent statute, was not chargeable with his debts unless he had charged it by will; except debts by specialty in which the heirs were bound.

Specialty debts
binding the heir.

Creditors by specialty binding the heirs had a remedy against the heir, to the extent or value of the freehold lands descended, by the common law. This remedy was extended to lands devised, by the statute of fraudulent devises, 13 & 14 W. & M. (1691), c. 14, re-enacted with slight alteration by 1 Will. IV. c. 47. These statutes enact that all devises and dispositions by will, as against creditors by specialty binding the heirs, shall be deemed fraudulent and void. Express exception is made of devises and dispositions for the raising or payment of debts; but such dispositions are within the exception only so far as they are effectual at law or in equity (a).

Remedy of
specialty creditor
at law.

The remedy at common law and under the statutes was by personal action against the heir, or the heir and devisee, entitling the specialty creditor to have the lands of the ancestor extended in execution, or to have execution for the value of the lands, if aliened (b). And in equity the creditor might obtain a sale of the land, with an account of past rents and profits, as an auxiliary remedy instead of taking them in execution; but the specialty debts did not otherwise operate as a charge upon the lands (c).

In equity.

Land, not
charged by will,
made assets in
equity, by Sta-
tute 3 & 4 Will.
IV. c. 104.

The statute 3 & 4 Will. IV. c. 104, (Sir J. Romilly's Act, 1833), enacts that "when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or

see *post*, Chap. II. Sect. VI. The Supreme Court of Judicature Act, (36 & 37 Vict. c. 66,) s. 25, (11) may, perhaps, be considered as operating upon the variance between the rules of equity and the rules of common law with reference to the administration of assets.

(a) See *Bailey v. Ekins*, 7 Ves.

323; *Hughes v. Dolben*, 2 Bro. C. C. 614.

(b) 2 Wms. Saund. 7, 8, notes to *Jeffreson v. Morton*.

(c) Seton on Decrees, 119, 2nd ed.; see *Richardson v. Horton*, 7 Beav. 112; *Morley v. Morley*, 5 D. M. & G. 610; 25 L. J. C. 1; *Rodham v. Morley*, 26 L. J. C. 438.

copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound: provided that in the administration of assets by courts of equity under and by virtue of this Act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands" (a).

Priority of specialty debts.

The statute gives the specialty creditor where the heirs are bound the same priority as to copyhold lands, as in the case of freeholds, though copyholds were not before chargeable in the hands of the heir (b).

The priority reserved in the proviso to specialty debts binding the heirs, together with the priority generally of specialty debts in the administration of assets at law and in equity, is taken away by the recent statute 32 & 33 Vict. c. 46, enacting as follows:—"In the administration of the estates of every person who shall die on or after 1st Jan., 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed,

Priority of specialty debts abolished.

(a) Real estate had been made assets in bankruptcy (then applying only to traders) for the payment of

all debts by 47 Geo. III. c. 74.

(b) *Burrell v. Smith*, L. R. 9 Eq. 443; 39 L. J. C. 544.

or instrument under seal, or is otherwise made or constituted a specialty debt; but all creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable" (a).

Effect of 3 & 4 Will. IV. c. 104, in charging the land.

The remedy of the creditor against the real estate under the statute 3 & 4 Will. IV. is by action or suit against the heir or heir and devisee personally, or by suit for administration of the deceased's estate. There is otherwise no charge or lien upon the land, and the heir may sell the land discharged of debts even to a purchaser with notice that they are unpaid, as the heir may be obliged to sell in order to provide for the debts, and where there are debts the purchaser is not bound to see to the application of the purchase money in payment of them; but a purchaser from the heir with notice that the sale was made for the purpose of defeating creditors, instead of paying them, might become chargeable as a participant in the fraud (b).—The personal representative does not, by force of the Act or otherwise, represent the creditors in respect of the real estate, and cannot maintain a suit to administer it; the creditors only can do so (c).

As against the heir or devisee.

But as against the heir or devisee the land is charged to the amount of the debts; they take no beneficial

(a) A judgment obtained against the administrator, though for a simple contract debt of the intestate, is not within the enactment and retains its priority, nor does it require registration under the statute 23. & 24 Vict. c. 38, s. 3, which applies only to judgments obtained against the deceased in his lifetime, in order to give the administrator the means of obtaining notice. *Williams v. Williams*, L. R. 15 Eq. 270; 42 L. J. C. 158; *Jennings v. Rigby*, 33 Beav. 198; 33 L. J. C. 149.

(b) *Richardson v. Horton*, 7 Beav.

112, where a settlement of the land upon the marriage of the heir, was supported against a specialty creditor of the ancestor; and see *Pimm v. Insall*, 1 Mac. & G. 449; *Kinderley v. Jervis*, 22 Beav. 1; 25 L. J. C. 538, and cases there cited. 2 *White & T. L. C.* 116, notes to *Silk v. Prime*. See *post*, pp. 275, 276.

(c) *Tubby v. Tubby*, 2 Coll. C. C. 136; *Catley v. Sampson*, 33 Beav. 551; 34 L. J. C. 96; but see *Carter v. Sanders*, 2 Drew. 248; 23 L. J. C. 679; and see *ante*, p. 261.

interest except subject to and after payment of the debts of the ancestor or testator; consequently a merely equitable disposition or charge made by the heir or devisee takes effect only upon his beneficial interest and is postponed to the claim of the creditors (*a*).

It is the general rule as between heir and devisee, that the lands descended are to be applied first in payment of the debts of the testator, unless a contrary intention appear by the will; a specific devise is taken as exonerating that land as against the land left to descend (*b*). A specific devise also exonerates the land devised as against the land passing by residuary devise (*c*).

Specific devise exonerates land as against heir.

And residuary devisee.

A general charge of debts upon all the real estate is taken to import no intention of altering this rule; but if a testator devises specific land for payment of his debts, or otherwise shows the intention of appropriating specific real estate for that purpose, the fund so created must bear the charge in exoneration of the residue of the real estate whether devised or left to descend (*d*).

Charge upon part of real estate in exoneration of residue.

(*a*) *Kinderley v. Jervis*, supra, holding that judgment creditors of the heir are postponed to simple contract creditors of the ancestor. *Carter v. Sanders*, 2 Drew. 248; 23 L. J. C. 679, holding that an equitable mortgagee by deposit of deeds from the heir was postponed to the creditors of the ancestor. *Pimm v. Insall*, 1 Mac. & G. 449, holding that a covenant by the heir on marriage to settle the land is postponed.

(*b*) *Davies v. Topp*, 1 Bro. C. C. 524; *Donne v. Lewis*, 2 Bro. C. C. 257; see *Waterhouse v. Clout*, 41 L. J. C. 223.

(*c*) *Brownson v. Lawrance*, L. R. 6. Eq. 1; *Lancefield v. Iggulden*, L. R. 17 Eq. 556; 43 L. J. C. 570. This is attributable to the intention imputed to a devise expressed in specific terms relatively to a general or residuary devise; *Ib.*; *Tombs v. Roch*, 2 Coll. 490. As regards the land comprised in it, a residuary devise is also specific; and the Wills Act, 1 Vict.

c. 26, s. 24 making the will speak from the death of the testator instead of the date of the will, has made no difference in this respect. *Hensman v. Fryer*, L. R. 3 Ch. 420; 37 L. J. C. 97; *Gibbins v. Eyden*, L. R. 7 Eq. 371; 38 L. J. C. 377.

(*d*) "The true question is, whether the testator meant only to behave honestly, which is all a general charge imports, or whether, beyond that honest conduct in creating a general charge for the security of his creditors, to create also a particular fund for payment of his debts."—"Upon *Davies v. Topp*, *Donne v. Lewis*, and many other cases, followed by the late case of *Harmood v. Oglander*, the rule must be considered settled, that, whatever may be the ordinary application, if there be a real fund created for discharge of debts, that will be to be applied first, when the question arises between the heir and devisee,

In a recent case a testator devised all his real estate to trustees to be disposed of according to the directions of his will. He directed them to pay all his debts, and then devised specifically certain estates leaving the rest undisposed of, which descended to his heir. It was held that the debts were charged *rateably* upon the devised and descended estates (a).

Lapsed devise.

A lapsed devise descending to the heir bears only the same charge of debts as if the devisee had survived, as against the residue of the estate (b).

Charge of debts on land in exoneration of personal estate.

A charge of debts upon the real estate presumptively makes it secondarily liable, only in case the personal estate, which is the primary fund, should prove to be insufficient. But a testator may make the real estate primarily liable, in exoneration of the personal estate, as between his real and personal representatives, by expressing a clear intention to that effect in his will (c).—Thus, a direction that certain debts should be exclusively and in the first instance borne by and paid out of a certain portion of the real estate was held to exonerate not only the residue of the real estate but also the personalty (d).

A direction to sell and convert the real estate, either

either as to estates, which the deviser had at the time, or which were acquired afterwards." *Per* Eldon, L. C., 8 Ves. 304, *Milnes v. Slater*; and see *per* Eldon, L. C., 8 Ves. 125, *Harwood v. Oglander*; and see the order of administering assets stated in 2 W. & T. L. C. 120, notes to *Silk v. Prime*.

(a) *Stead v. Hardaker*, L. R. 15 Eq. 175; 42 L. J. C. 317. It seems difficult to reconcile this case with the admitted construction that a general charge of debts on all the real estate does not affect the relative incidence of the charge. But the Vice-Chancellor Malins said, "That the rule that descended estates are liable for the payment of debts in priority to the specifically devised

estates is a very unreasonable rule, and that the court would not follow it unless it was bound to do so."

(b) *Fisher v. Fisher*, 2 Keen, 610; *Wood v. Ordish*, 3 S. & G. 125; *Peacock v. Peacock*, 34 L. J. C. 315; *Ryves v. Ryves*, L. R. 11 Eq. 539; 40 L. J. C. 252.

(c) 2 Jarman on Wills, 564; *Hawkins on Wills*, 287; 1 W. & T. L. C. 580, notes to *Duke of Ancaster v. Mayer*; *Tait v. Lord Northwick*, 4 Ves. 816; *Brydges v. Phillips*, 6 Ves. 567; *Bootle v. Blundell*, 1 Mer. 193; see *per* James, L. J. in *Allan v. Gott*, L. R. 7 Ch. 442; 41 L. J. C. 571.

(d) *Forrest v. Prescott*, L. R. 10 Eq. 545.

absolute or discretionary, for the purpose of creating a mixed fund with the personalty to provide for debts and liabilities, charges the real and personal estates rateably, in proportion to the relative values (a). A mere gift of the real and personal estate together for the payment of debts, without providing for the conversion of the realty or otherwise showing the intention of creating a mixed fund, does not charge them rateably, and the personalty retains the primary liability according to the ordinary rule (b).

Charge on mixed fund rateably.

Such preferential distributions of the charge of debts operate only as between the real and personal representatives and the beneficiaries under the will; they have no effect against the claims of creditors duly preferred against the assets in general (c).—But if the creditor be in default, as in not coming in under a decree, he may be compelled to adopt the distribution according to the will (d).

Creditors not bound by preferential charges of debts.

Unless in default.

If a pecuniary legacy is given generally, the ordinary rule and presumption is that the personal estate is the exclusive fund for the payment; and if the personal estate proves deficient, that alone is no ground for charging the deficiency either wholly or rateably upon the real estate.—Only if the personal estate is exhausted by debts, the pecuniary legatee may stand in the place of the creditors, and to that extent charge the lands descended; but he has no such right as against lands specifically devised, nor against a residuary devisee (e).

Charge of legacies on real estate.

(a) 2 Jarman on Wills, 549; Hawkins on Wills, 290; *Roberts v. Walker*, 1 R. & M. 752; *Allan v. Gott*, L. R. 7 Ch. 439; 41 L. J. C. 571.

(b) *Boughton v. Boughton*, 1 H. L. C. 406; *Tench v. Cheese*, 6 D. M. & G. 453, explained in *Allan v. Gott*, *supra*.

(c) *Davies v. Nicholson*, 2 D. & J. 693; 27 L. J. C. 719.

(d) *Gillespie v. Alexander*, 3

Russ. 130; *Greig v. Somerville*, 1 Russ. & M. 338.

(e) *Mirehouse v. Scaife*, 2 M. & Cr. 695; *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 234; 41 L. J. C. 565; explaining *Hensman v. Fryer*, L. R. 3 Ch. Ap. 420; 37 L. J. C. 97, where it was held that upon a deficiency of the personal estate a legatee and the residuary devisee must contribute rateably to the

Charge of legacies on real estate in aid of personalty.

If the real estate be also charged with the legacy, the presumption is that it is made secondarily liable, only in case the personal estate, which is the primary fund, should be insufficient (a). Where a legacy is thus charged upon the real estate, the insufficiency of the personalty, and consequent amount of charge, is *primâ facie* to be determined at the death of the testator, and the land is not charged with a deficiency subsequently arising by the default of the executor (b). But where the devisee of the real estate was also executor, the land was held charged with a deficiency caused by his default (c).

On real and personal estate rateably.

The real and personal estate may be charged with the payment of pecuniary legacies rateably by a sufficient expression of intention to that effect in the will; as by the testator creating a mixed fund of the real and personal estate out of which the legacies are directed to be paid (d).

On real estate exclusively.

A pecuniary legacy may be charged upon real estate exclusively; for it has no existence but by the will and must come out of the fund the testator points out, unlike debts which have a separate and independent claim by operation of law (e). Thus the devise of an estate upon trust to pay a certain sum to a person, or to pay certain legacies, charges such legacies exclusively upon that estate (f). So, a direction that legacies shall be paid *out of* a certain estate, or out of the real estate generally, as distinguished from a charge of the legacies *upon* the real estate, creates an exclusive charge (g).

debts. The above is an application of the principle of marshalling assets, see 2 W. & T. L. C. 83, notes to *Aldrich v. Cooper*, and see *post*, Chap. II. Sect. VI.

(a) *Davies v. Ashford*, 15 Sim. 42; see *Poole v. Heron*, 42 L. J. C. 348.

(b) *Richardson v. Morton*, L. R. 13 Eq. 123; 41 L. J. C. 8.

(c) *Howard v. Chaffer*, 2 D. & S. 236; 32 L. J. C. 686.

(d) See *ante*, p. 267; *Allan v.*

Gott, L. R. 7 Ch. 439; 41 L. J. C. 571.

(e) See *per Grant*, M. R., 6 Ves. 571, *Brydges v. Phillips*; *per Shadwell*, V. C., 11 Sim. 227, *Jones v. Bruce*.

(f) *Spurway v. Glynn*, 9 Ves. 483; *White v. Vitty*, 2 Russ. 484.

(g) *Heath v. Heath*, 2 P. Wms. 366; *Amesbury v. Brown*, 1 Ves. sen. 482; *Davies v. Ashford*, 15 Sim. 42.

The nature of the legacy may also show the intention of charging it exclusively or primarily upon the real estate. As where a testator charged his real estate with sums for his children and directed that interest should be raised out of the real estate for their maintenance, it was held that the sums were intended to be raised only in the same manner (a). So a bequest of an annuity charged upon an estate with a power of distress, was held to charge the land primarily, if not exclusively (b).

A general charge of pecuniary legacies on the real estate is presumed not to be intended to extend to land specifically devised (c). But where a charge is made of debts and legacies combined, the same general terms will charge both upon all the real estate, including estates specifically devised (d). As against devisees.

Where legacies are given generally and followed by a gift of the *residue* of the real and personal estate, the legacies are taken to be charged upon the real and personal estate as one fund (e). But where there is also a specific devise of real estate, the *residue*, as to the real estate, may be intended with reference to such devise, and only as to the personal estate with reference to the legacies (f). Charge of legacies implied from gift of residue.

An equitable charge upon land carries interest at the rate of four *per cent.*, in the absence of any special trust or direction concerning interest (g):—as a deposit or Interest upon charge.

(a) *Jones v. Bruce*, 11 Sim. 221.

(b) *Poole v. Heron*, 42 L. J. C. 348.

(c) *Hawkins on Wills*, 296; *Spong v. Spong*, 3 Bligh. N. S. 84; *Conron v. Conron*, 7 H. L. C. 168. See *ante*, p. 265.

(d) *Maskell v. Farrington*, 3 D. J. & S. 338; see *Mannox v. Greener*, L. R. 14 Eq. 456; but the debts will take priority, 2 W. & T. L. C. 119, notes to *Silk v. Prime*.

(e) *Hawkins on Wills*, 294; *Mirehouse v. Scaife*, 2 M. & Cr. 695; *Greville v. Browne*, 7 H. L. C. 689; *Peacock v. Peacock*, 34 L.

J. C. 315; *Gainsford v. Dunn*, L. R. 17 Eq. 405; 43 L. J. C. 403, where the charge was extended to property, over which the testator had a power of appointment as being included in the residue.

(f) See *Castle v. Gillet*, L. R. 16 Eq. 530.

(g) In the case of a breach of trust, the trustee would be charged with interest at the rate of five *per cent.* *Lewin on Trusts*, 254, 4th ed.; and see *per* L. Cairns, L. R. 6 H. L. 209, *Imperial Merc. Credit v. Coleman*. A trustee must ac-

instalment of purchase money paid under a contract of sale, after default in the vendor or rescission on account of fraud or mistake, for which therefore the purchaser acquires a lien upon the land (a);—an equitable mortgage by deposit of deeds to secure a debt not bearing interest (b);—costs ordered by the court to stand charged upon certain property (c).

Interest upon
debts.

A charge or trust for payment of debts presumptively includes such amount of interest as the debts bear at the rate contracted for, both interest due and interest accruing due up to the time of payment. And it seems that a debt not bearing interest by being charged upon land, will *prima facie* carry interest from the time of the charge vesting in the creditor (d). Upon debts arising from ordinary commercial and money transactions the Court of Chancery allows interest at five *per cent.* (e).

Interest upon
legacies.

A pecuniary legacy given in general terms, without any time fixed for payment, if charged immediately upon land, carries interest from the death of the testator; but if charged by a trust for sale, or as charging the personal estate, it is not, in general, payable, and therefore does not carry interest, until a year after the death.—A legacy payable at a fixed time carries interest from the time of payment only, unless expressly payable with interest (f).

count for all the profits actually made out of the trust funds. See *ante*, p. 150.

(a) *Rose v. Watson*, 10 H. L. C. 672; 33 L. J. C. 385; *Torrance v. Bolton*, L. R. 14 Eq. 124; 41 L. J. C. 643; see *post*, p. 305.

(b) *Re Kerr's Policy*, L. R. 8 Eq. 331; 38 L. J. C. 539, but decided on the ground "that a deposit of deeds to secure a loan is to be considered as an agreement to execute a mortgage with interest." See *Mel-ler v. Wood*, 1 Keen 16.

(c) *Lippard v. Ricketts*, L. R. 14 Eq. 291; 41 L. J. C. 595. "When the Court has once decided that there is a charge, the sum charged must bear interest." *Ib.*

(d) See Lewin on Trusts, 362, 4th ed.; 2 Spence, Eq. Jur. 355. As to interest on portions see *ib.* 409. All debts carry interest from the date of the decree or order for payment out of assets. Seton on Decrees, 50, 147, 2nd ed. A judgment debt carries interest at the rate of four *per cent.* 1 & 2 Vict. c. 110, s. 17.

(e) See *re Beulah Park Estate*, L. R. 15 Eq. 43; *Alison's Case*, L. R. 15 Eq. 394; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484; *Finch v. Pescott*, L. R. 17 Eq. 554; *Hill v. Staffordshire Ry. Co.* L. R. 18 Eq. 154, 171; 43 L. J. C. 556.

(f) 2 W. & T. L. C. 283, 3rd ed., notes to *Ashburner v. Macguire*,

A legacy to an infant child of the testator, though future or contingent, is held to carry interest from the death, in favour of maintenance; and so also if a future or contingent legacy be given to an infant with an express trust for maintenance, though not a child of the testator (a).—A specific legacy carries all the interest or dividends actually accruing upon it from the death of the testator (b).

Charges on land are regulated, as to the person to raise them and as to the mode of raising them, by the provisions of the instrument creating the charges; or, in the absence or failure of such provisions, they are left to the remedies given by the Court of Chancery.

Power to raise charges.

Charges created by will, without any express provision in the will for raising them, are now regulated by the statute 22 & 23 Vict. c. 35, the Trustee Relief Act. By section 14, it is enacted that "where by any will which shall come into operation after the passing of this Act (13th August, 1859), a testator shall have charged his real estate with the payment of his debts or of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate,

Statutory power in devisee.

where see as to the time of payment of legacies and interest. The rule is that executors have a year to inquire into the liabilities of the testator's estate and to pay the debts and legacies; though it might happen that they would be responsible for not distributing or investing before that period. *Johnston v. Newton*, 11 Hare 160; 22 L. J. C. 1039. The same rule applies with a trust for sale. *Turner v. Buck*, 43 L. J. C. 583. As between a tenant for life and remainderman of a fund charged with debts "the executors will be taken by the court as having applied in

payment such a portion as together with the income of that portion for one year was necessary for the payment of the debts." *Allhusen v. Whittell*, L. R. 4 Eq. 295; 36 L. J. C. 929. Notwithstanding the actual rate of income be much higher than the interest payable on the debts. *Lambert v. Lambert*, L. R. 16 Eq. 320; 43 L. J. C. 106.

(a) 2 W. & T. L. C. p. 286; *re Richards*, L. R. 8 Eq. 119; *Chidgey v. Whitby*, 41 L. J. C. 699.

(b) 2 W. & T. L. C. 283; *Davies v. Fowler*, L. R. 16 Eq. 308; 43 L. J. C. 90.

it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money by a sale and absolute disposition—or by a mortgage of the same.”

By section 15, the same powers are extended to all persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or to any persons appointed under the will or by the court to succeed to the trusteeship vested in such devisee in trust.

Or in executor. By section 16, “If any testator who shall have created such charge shall not have devised the hereditaments charged in such terms as that his whole estate and interest therein shall become vested in any trustees, the executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested.”

In wills before the Act.

This statute has removed some doubts and difficulties concerning the power to raise charges by will, which may still affect wills which came into operation before the passing of the Act. As to such wills, it appears that a direction that executors shall sell the land, or that the land shall be sold and the proceeds distributed by the executors, was held to vest a power to sell in the executors (a); but where there is a general charge of debts upon real estate, without any reference to the person intended to raise the charge, the question in whom the power is vested appears to have been left in some doubt (b). Where a testator directed in general terms

(a) Sugden on Powers, 115–118, 8th ed.

(b) See notes to *Elliot v. Merri-man*, 1 W. & T. L. C. 79–85, where

the conclusion drawn from the cases is thus stated :—“that where there is a general charge of debts upon real estate, the executors have in

that his debts should be paid and afterwards devised a specific estate to a devisee charged with debts, it was held that the devise superseded the general charge, and that the devisee could give a good title and a good discharge to a mortgagee without the executors joining (a).

A general charge upon land or a trust to raise money, not prescribing any particular mode of raising it, in general, authorises a sale. And "a power to sell implies a power to mortgage, which is a conditional sale; for it would be most injurious to the owners of estates charged, if the trustee could effect the object of his trust only by selling the estate" (b). A power to mortgage imports a mortgage with a power of sale (c). But a trust requiring an absolute sale and conversion of the property, and not merely the raising of a charge, does not authorise a mortgage (d).

A charge upon or trust to raise money by "the rents and profits" of land is not, in general, restricted to the *annual* rents and profits, and will authorise a sale or mortgage of the land (e). A trust to raise a charge

Power to raise charge by sale or mortgage.

By rents and profits.

equity an implied power to sell it, and they alone can give a valid receipt for the purchase money; but as they do not take by implication a legal power to sell, and cannot therefore convey the legal estate, (*Doe v. Hughes*, 6 Ex. 223,) the persons in whom it is vested (if it be not already in the executors by devise or otherwise) must concur with them in the conveyance."

(a) *Corser v. Cartwright*, L. R. 8 Ch. 971.

(b) *Per Cottenham*, L. C., 4 M. & Cr. 268, *Ball v. Harris*.

(c) *Cruikshank v. Duffin*, 41 L. J. C. 317.

(d) *Stroughill v. Anstey*, 1 D. M. & G. 635; 22 L. J. C. 130.

(e) "In general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning and to con-

fine them to the receipts of the rents as profits as they accrue, the Court in order to obtain the end intended by raising the money, has by a liberal construction of these words, taken them to amount to a direction to sell, and as a devise of the rents and profits will at law pass the land, the raising by rents and profits is the same as raising by sale." *Per Hardwicke*, L. C., 1 Atk. 506, *Green v. Belcher*; *Ambl.* 95, *Gibson v. Rogers*; *Allan v. Backhouse*, 2 V. & B. 65; and see *per Eldon*, L. C., 1 Mer. 232, *Bootle v. Blundell*. "By a grant of the profits of land at law the whole land doth pass, for what is the land but the profits." *Co. Lit.* 4 b. So a devise of "the rents and profits" of land is equivalent to a devise of the land itself. 2 *Jarman on Wills*, 534; *Hawkins on Wills*, 120.

out of rents and profits by leasing for lives at the accustomed rent was held to be restricted to that mode of raising the charge and not to authorise a sale or mortgage (a).

Charges of annuities.

Where an annuity is charged upon land, with legal powers of distress and entry, the Court of Chancery will not in general give the additional remedies of a sale or mortgage or the appointment of a receiver; the annuitant may distrain, or may enter and take the rents and profits until the arrears are satisfied (b). But if the land be insufficient, or where the land is not in settlement, it seems that a sale may be decreed (c).

An annuity may be charged generally upon the land, or upon the annual profits only, without resort to the land; also in the latter case it may be charged upon the profits of the current year only, without any continuing charge for arrears, or arrears may also continue charged upon the annual profits. The incidence of the charge in these respects depends upon the construction of the instrument creating the annuity, and the remedies against the land are restricted accordingly (d).

Power to discharge by receipt.

The persons entitled to charges on land or the money to be raised under trusts for sale are the equitable owners of the land *pro tanto*; and therefore, as a general rule, they alone are empowered to give receipts for the money and discharge the land, though the trustee as the legal owner may convey the legal estate. Consequently, a purchaser of land subject to charges must pay the

(a) *Ivy v. Gilbert*, 2 P. Wms. 13; *Mills v. Banks*, 3 P. Wms. 1; and see as to the restricted construction of a charge on profits, *Wilson v. Halliley*, 1 Russ. and M. 590; *Playters v. Abbott*, 2 M. & K. 110.

(b) *Graves v. Hicks*, 11 Sim. 551; *Sollory v. Leaver*, L. R. 9 Eq. 22; 40 L. J. C. 398; *Taylor v. Taylor*, L. R. 17 Eq. 325; 43 L. J. C. 314. *Kelsey v. Kelsey*, L. R. 17 Eq.

495.

(c) *Horton v. Hall*, L. R. 17 Eq. 437; *Cupit v. Jackson*, 13 Price, 721, explained in *Graves v. Hicks*, 11 Sim. 554.

(d) See notes to *Ashburner v. Macquire*, 2 W. & T. L. C. 262; *Birch v. Sherratt*, L. R. 2 Eq. 644; 36 L. J. C. 925; *Booth v. Coulton*, L. R. 5 Ch. 684; 39 L. J. C. 622; *Taylor v. Taylor*, *supra*.

purchase money to the persons entitled to the charges, or see that it is rightly applied in paying them ; otherwise the land may remain subject to the charges in his hand (a).

But the trust creating the charge may expressly Express. or impliedly empower the trustee to give receipts to the purchaser, which shall relieve him from seeing to the application of the money ; and an express clause to that effect is commonly inserted in trusts conferring powers to raise money by sale or mortgage (b).

The power to give receipts, if no express power be Implied in charge to pay debts. given, may be implied from the purpose of the trust or charge according to the following rules :—If the trust or charge be created for the payment of debts generally, a purchaser is not bound to see that the purchase money is rightly applied ; by reason of the indefinite nature of the trust or charge, which the purchaser is unable to ascertain (c).

If the trust or charge be for the payment of specified Charge to pay specified debts. or scheduled debts to certain creditors, the general rule prevails, and the purchaser is bound to see that the money is rightly applied (d). And so also if the trust or Or legacies. charge be for the payment of legacies to certain persons (e).

If the trust or charge be for the payment of debts and Charge to pay debts and legacies. legacies, the purchaser is not bound to see to the application of the purchase money, for the debts are indefinite and take priority of the legacies. And it seems that it is not material in such case that the purchaser knows that there are no debts, or that all the debts have been paid, leaving the legacies as the only charge ; for the implied

(a) See *ante*, p. 143 ; notes to *Elliot v. Merriman*, 1 W. & T. L. C. 58 ; 2 Spence, Eq. Jur. 380.

(b) *Ib.* ; see *ante*, p. 145.

(c) *Elliot v. Merriman*, 1 W. & T. L. C. 51 ; notes *Ib.* p. 58 ; *Ball*

v. Harris, 4 M. & Cr. 264 ; Lewin on Trustees, 312, 4th ed.

(d) 1 W. & T. L. C. 58, notes to *Elliot v. Merriman* ; Lewin, 313.

(e) *Ib.* ; per Lyndhurst, L. C., 3 M. & K. 630, *Johnson v. Kennet*,

power to give receipts arises upon the construction of the will, independently of the circumstances (*a*).

Effect of 3 & 4
Will. IV. c. 104.

The statute 3 & 4 Will. IV. c. 104, making the real estate of a deceased person assets for the payment of all his debts as against the heir or devisee, does not create a charge of the debts upon the land, so as to exempt a purchaser from seeing to the application of his purchase money in payment of legacies or other specific charges (*b*).

Sale for purposes
not ascertained.

If the trust directs an immediate sale for purposes not immediately ascertainable, there is an implied power in the trustee to give receipts, and which is independent of subsequent events (*c*). So where the proceeds of the sale are payable to infants who are not capable of signing receipts (*d*). So where it is required that the trustees should hold the proceeds for the purposes of the trust (*e*); or should re-invest the proceeds (*f*).

Notice of breach
of trust.

In all cases, though there be a power in the trustees selling the land to give receipts to the purchaser, if the purchaser have notice that the sale is made improperly or for the purpose of misapplying the money, he may become chargeable as participating in the breach of trust (*g*).

Power in execu-
tors to give re-
ceipts.

Executors take the personal estate of the testator, including the leaseholds and chattels real, *virtute officii*, with an absolute power of sale or mortgage for the payment of debts and the general purposes of the will; and

(*a*) 1 W. & T. L. C. 59-64; *Johnson v. Kennet*, 3 M. & K. 624; *Forbes v. Peacock*, 1 Phill. 717; *Eland v. Eland*, 4 M. & Cr. 420; *Page v. Adam*, 4 Beav. 269, the same rule applies if the legacies are in the form of annuities; *Stroughill v. Anstey*, 1 D. M. & G. 635; 22 L. J. C. 130; but see *per* Kindersley, V. C., in *Howard v. Chaffer*, 2 Dr. & S. 236; 32 L. J. C. 701, as to the effect of notice of payment of the debts.

(*b*) See *Horn v. Horn*, 2 S. & S. 448; and see *ante*, p. 264,

(*c*) *Balfour v. Welland*, 16 Ves. 151; Lewin, 310.

(*d*) *Sowarsby v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46; *aliter* if not payable until majority, *Dickenson v. Dickenson*, 3 Bro. C. C. 19.

(*e*) *Doran v. Wiltshire*, 3 Swanst. 699.

(*f*) *Lock v. Lomas*, 5 De G. & S. 329; 21 L. J. C. 503.

(*g*) *Stroughill v. Anstey*, *supra*; *Howard v. Chaffer*, *supra*; *Dance v. Goldingham*, L. R. 8 Ch. 902; 42 L. J. C. 777; and see *ante*, p. 146.

a purchaser or mortgagee from the executor is not bound to see to the application of the money (*a*). But if the sale or mortgage is a fraud upon the estate, or made for the purpose of misapplying the money, to the knowledge of the purchaser or mortgagee, as a sale or mortgage to a creditor of the executor for his own debt, the person so acquiring the assets will be chargeable with the full value to the creditors and legatees (*b*).

Notice that sale improper.

A general power of giving receipts in discharge is now vested in trustees by statute, thereby supplying the want of an express receipt clause in the instrument creating the charge or trust. The statute 23 & 24 Vict. c. 145 (Lord Cranworth's Act) s. 29, enacts that "the receipts in writing of any trustees or trustee, for any money payable to them or him by reason or in exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof."

Statutory power to give receipts.

Statutory power in trustees to give receipt.

The power thereby conferred may be varied or altogether excluded by the terms of the instrument. And it extends only to persons entitled or acting under a deed, will or other instrument executed after the passing of the act (*c*). A like power to discharge by receipts was given by the 22 & 23 Vict. c. 35, s. 23, but not in such general terms.

(*a*) Notes to *Elliot v. Merriman*, supra, p. 73; Lewin, p. 329.

son, 7 Ves. 152; *McLeod v. Drummond*, 17 Ves. 152; 1 Cox, 145.

(*b*) *Ib.*; Lewin, 331; *Scott v. Tyler*, 2 Dick. 725; *Hill v. Simp-*

(*c*) Sections 32, 34; see *ante*, p. 146.

§ 4. MORTGAGES.

Mortgage by conveyance with proviso for redemption—redemption—foreclosure—power of sale—covenant to pay debt and interest.

Mortgage by conveyance upon trust for sale.

Equity of redemption of mortgage in fee—of mortgage of term of years—special reservation of in mortgage deed—surplus proceeds of sale under the mortgage.

Liability of the personal estate for the mortgage debt—Locke King's Act making the land primarily liable—Act to explain "contrary intention" in will.

Mortgagor in possession at law—tenant under mortgagor—redemise to mortgagor—distress for rent or interest.

Charge of mortgagee for the debt—legal estate of the mortgagee—devise by mortgagee—transfer of legal estate by vesting order—by personal representative of mortgagee.

Mortgagee in possession bound to account—annual rests—costs of repair, etc.—insurance.

Distinction between a mortgagee and a trustee.

Equitable mortgage by deposit of deeds—agreement as to the deposit—remedy of equitable mortgagee.

Equitable mortgage by agreement without deposit.

Mortgage of copyholds—of leaseholds—of equitable estates and interests—notice to the trustee.

Mortgage by conveyance with proviso for redemption.

A mortgage is a charge upon land created for the security of money lent. The ordinary form of a mortgage is by an absolute conveyance at law to the mortgagee; subject to an express *proviso for redemption*, being in effect a declaration of trust, that upon payment of the debt and interest at an appointed day, the mortgagee shall reconvey to the mortgagor (*a*).

Redemption.

The mortgagor is not restricted in redemption by the express terms of the proviso. The time therein appointed

(*a*) See Butler's note (1) to Co. Lit. 205 *a*; Hayes on Convey. v. 2, p. 119, n (109), 5th ed. As to the earlier form of a mortgage by

conveyance upon condition at common law, and the *equity of redemption* arising after forfeiture, see *ante*, p. 232.

for payment is not considered in equity as being material or, as it is said, of the essence of the contract, further than as fixing a day before which the money is not due or payable; and redemption may be made and a reconveyance demanded at any time afterwards. For it is a principle of equity that a mortgage cannot by any terms of agreement therein be made irredeemable (*a*); and parol evidence is admissible to show that a conveyance was intended as a security only (*b*).

But if the mortgagor allow the time appointed for payment to pass, he must give six months' notice before he can redeem; and if he do not then exercise his right, he must renew the notice; or he may pay six months' interest in lieu of notice (*c*). But a mortgagee suing for payment of the debt dispenses with notice, and is not entitled to any interest in lieu of it (*d*).

Notice to redeem.

If the mortgagee refuse the tender of payment at the expiration of the notice, the amount tendered being sufficient, he will be liable for the costs of a suit for redemption (*e*).

Mortgagee refusing tender liable for costs of redemption.

If an action be brought by the mortgagee for the debt or an action of ejectment for the land, the Courts of common law have a summary jurisdiction by statute to stay proceedings and compel a reconveyance, on payment of the principal, interest, and costs (*f*).—By the Supreme Court of Judicature Act, 36 & 37 Vict. c. 66, s. 24, the courts thereby constituted will have full power to give effect to every equitable ground of relief or defence to

Redemption at law by statute.

(*a*) *Howard v. Harris*, 1 Vern. 190; 2 W. & T. L. C. 947; *per Eldon*, L. C., 7 Ves. 273 in *Seton v. Slade*; see *Williams v. Owen*, 5 My. & Cr. 303.

(*b*) See *ante*, p. 133; and see Coote on Mortgages, ch. iii. 3rd ed.

(*c*) *Day v. Day*, 31 Beav. 270; 31 L. J. C. 806; see *Cruikshank v. Duffin*, 41 L. J. C. 317, 320.

(*d*) *Letts v. Hutchins*, L. R. 13 Eq. 176.

(*e*) *Harmer v. Priestly*, 16 Beav. 569; 22 L. J. C. 1041. As to tender by a stranger or by a person having a partial interest only in the equity of redemption, see *Pearce v. Morris*, L. R. 8 Eq. 217; 5 Ch. 227; 39 L. J. C. 342.

(*f*) 7 Geo. II. c. 20; C. L. P. Act, 1852, 15 & 16 Vict. c. 76, s. 219; see *Day's Common Law Proced. Acts. Bourton v. Williams*, L. R. 9 Eq. 297; 5 Ch. 655; 39 L. J. C. 800.

which the mortgagor may be entitled against the claim of the mortgagee.

Foreclosure.

The mortgagee, on the other hand, after default in payment may file a bill of foreclosure, under which it may be decreed that an account be taken of what is due to him for principal, interest and costs, and that in default of payment within six months the mortgagor be foreclosed or barred of his equity of redemption; and upon default in payment under such decree the mortgagee may obtain a final order of foreclosure, and his title is then complete in equity as well as at law (a).

Charge realised
by sale, not
foreclosure.

“If there is a charge *simpliciter*, and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale and not foreclosure” (b)

Power of sale.

It is usual in a mortgage deed to give to the mortgagee an express power of sale, with a declaration of trust, as to the proceeds, to pay the sum due for debt, interest and costs, and as to the surplus for the mortgagor. The power of sale prevails over the equity of redemption and enables the mortgagee to make a good title to a purchaser in equity, as well as under his legal title, without proceeding to foreclose or any other application to the court. It is therefore, in general, a more convenient remedy; but it does not supersede or affect the remedy of foreclosure (c). A power to mortgage imports a mortgage with a power of sale (d).

The power of sale is usually made absolute as to time

(a) Seton on Decrees, 187, 2d ed.; the time for payment may be enlarged, *ib.*; 2 W. & T. L. C. 961, in notes to *Howard v. Harris*; the title by foreclosure dates from the final order and not from the decree. *Thompson v. Grant*, 4 Madd. 438.

(b) *Per* Hatherley, L. C., in

Tennant v. Trenchard, 38 L. J. C. 661; L. R. 4 Ch. 542; see *Matthews v. Goodday*, 31 L. J. C. 282; and see *ante*, p. 273.

(c) *Wayne v. Hanham*, 9 Hare, 62; 20 L. J. C. 530.

(d) *Chawner's Will*, L. R. 8 Eq. 569; 38 L. J. C. 726; *Cruikshank v. Duffin*, 41 L. J. C. 317.

and circumstances, and it is expressly provided that a purchaser shall not be bound or concerned to inquire as to the necessity or propriety of its exercise; but in favour of the mortgagor it is stipulated that it shall not be exercised unless default is made in payment, and notice given (a).—The power of sale is usually given to the executors and administrators of the mortgagee after his death, in order that it may accompany the debt which passes to them as being personal estate (b).

The statute 23 & 24 Vict. c. 145, (Lord Cranworth's Act,) s. 11, enacts that, "where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, shall at any time after the expiration of one year from the time when such principal money shall have become payable, or after any interest on such principal money shall have been in arrear for six months,—have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely, 1st. A power to sell the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time in like manner." The enactment gives the further powers of insuring the property, and of appointing a receiver of the rents (c).

The powers here given extend only to "mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debts" (Sect. 24). The deed may declare that they shall not

(a) *Jenkins v. Jones*, 2 Giff. 99; 29 L. J. C. 493, where see as to the effect of notice to a purchaser that the sale was irregular or oppressive, and see further as to the form and effect of the power of sale, 2 Hayes Conv. 140 n. (130),

(131), 5th ed.; 1 Prideaux Conv. 434, 7th ed.

(b) See *post*, p. 294.

(c) As to this statutory power of sale, see 1 Prideaux Conv. 461, 7th ed.

take effect, or may vary or limit such powers (Sect. 32). And the Act extends only to deeds executed after the passing of the Act (Sect. 34).

Court may direct
a sale instead of
foreclosure.

By the statute 15 & 16 Vict. c. 86, (to amend the practise and procedure in the Court of Chancery,) s. 48, it is enacted that "it shall be lawful for the Court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct."—Before this enactment the Court had jurisdiction to direct a sale in a suit for foreclosure under certain special circumstances only (*a*).

Covenant to pay
mortgage debt.

It is also usual for the mortgagor to covenant in the mortgage deed to repay the money; which gives the mortgagee a personal remedy by action and constitutes the loan a specialty debt (*b*).—A covenant to secure a loan by a mortgage deed to contain usual covenants has a like effect in converting the debt into a specialty (*c*).

And interest.

The covenant is usually extended to the payment of the interest; and under such covenant arrears of interest may be recovered within twenty years. But no arrears of interest in respect of any sum of money charged upon land can be recovered, but within six years next after the same shall have become due (*d*).

(*a*) 2 W. & T. L. C. 961, notes to *Howard v. Harris*; and as to the application of the above enactment, see *lb.*; *Hurst v. Hurst*, 16 Beav. 372; 22 L. J. C. 538; *Hutton v. Sealy*, 27 L. J. C. 263; *Newman v. Selfe*, 33 Beav. 522; 33 L. J. C. 527.

(*b*) *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J. Ex. 150; *Brown v. Price*, 4 C. B. N. S. 598; 27 L. J. C. P. 290; see *Marryat v. Mar-*

ryat, 28 Beav. 224; 29 L. J. C. 665; *Isaacson v. Harwood*, L. R. 3 Ch. Ap. 225; 37 L. J. C. 209.

(*c*) *Saunders v. Milsome*, L. R. 2 Eq. 573; and see *Kidd v. Boone*, L. R. 12 Eq. 89; 40 L. J. C. 531.

(*d*) 3 & 4 Will. IV. c. 42, s. 3; 3 & 4 Will. IV. c. 27, s. 42; *Hunter v. Nockolds*, 1 M. & G. 640; *Round v. Bell*, 30 Beav. 121; 31 L. J. C. 127, see the cases there cited; and see *post*, Part IV. 'Limitations.'

This personal security may be given by a separate instrument, as a bond, instead of the covenant in the mortgage deed; which has the advantage of enabling the mortgagee, upon a sale of the land, to deliver over the mortgage deed to a purchaser, and retain the bond for the purpose of his personal remedy, in case the proceeds of the sale should prove insufficient.—Where trustees raise money on mortgage, it is usual for the equitable owners only and not the trustees to execute the personal covenants required, and, as against the trustees, the land is the only security (a).

Separate bond
for the debt.

The mortgagee may enforce his remedies against the land and also upon the personal covenant at the same time; but they are so connected, as against the mortgagor, that whatever is realized from the one must be allowed in discharge of the other. Thus, if he exercises the power of sale and does not realize the amount of his charge, he may still proceed upon the covenant for the balance. So, although he forecloses, he may proceed upon the covenant; but in the latter case *he opens the foreclosure*, that is he gives to the mortgagor a renewed right to redeem. Hence in order to proceed upon the covenant after a foreclosure, he must remain in a position to give redemption; and if he sells the estate, though for less than the amount of the debt, or otherwise puts it out of his power to reconvey, he can no longer pursue any remedy for the deficiency (b).

Connection of
remedies of
mortgagee.

Proceeding for
the debt, after
foreclosure.

A mortgage is sometimes made in the form of a conveyance to the mortgagee or his trustee upon an express trust to sell, after default in payment, and out of the proceeds to pay the debt, interest and costs to the mortgagee, and the surplus to the mortgagor. This is strictly a mortgage in that the mortgagor has only the

Mortgage by
express trust
for sale.

May be re-
deemed.

(a) 1 Pridgeaux Conv. 570, 7th ed.

(b) *Lockhart v. Hardy*, 9 Beav. 349; *Palmer v. Hendrie*, 27 Beav. 349; 28 ib. 341; see *Thornton v.*

Court, 3 D. M. & G. 293; 22 L. J. C. 361; *Walker v. Jones*, L. R. 1 P. C. 50; 35 L. J. C. P. 30; *Rudge v. Richens*, L. R. 8 C. P. 358; 42 L. J. C. P. 127.

Mortgage by trust for sale cannot be foreclosed.

ordinary right to redeem, and is not entitled to call for an execution of the trust by sale, which is exclusively at the option of the mortgagee. On the other hand, the mortgagee has no right of foreclosure and can only proceed by execution of the trust (a).

Accordingly, the mortgagor has the usual period of six months to redeem before the trust for sale can be executed (b). The mortgagee is not disqualified as trustee, from purchasing on a sale by a prior mortgagee, there being no trust for the mortgagor until redemption by payment (c). And there is no such express trust as prevents him acquiring, as mortgagee, a title by continuing in possession for twenty years without acknowledgment under the statute of limitations, 3 & 4 Will. IV. c. 27, s. 28 (d).

Equity of redemption of mortgagor.

In equity the mortgagor is still considered as the owner of the land, subject to the charges secured to the mortgagee. He retains, independently of the express terms of the proviso for redemption, the right to redeem at any time before foreclosure and have a reconveyance of the legal estate, which right is technically known as the *equity of redemption* (e).

Of mortgage in fee.

The equity of redemption of land mortgaged in fee is regarded as part of the original beneficial ownership, and of the nature of real estate. It may be conveyed and limited in various estates, or devised by will, or left to descend to the heir; and the person or persons becoming entitled by conveyance, descent or devise may exercise the right to redeem, and have a reconveyance according to their respective estates and interests (f).

(a) *Kerrick v. Saffery*, 7 Sim. 317; *Bell v. Carter*, 17 Beav. 11; 22 L. J. C. 933; *Kirkwood v. Thompson*, 2 H. & M. 402; 34 L. J. C. 305; *Locking v. Parker*, L. R. 8 Ch. 30; 42 L. J. C. 257.

(b) *Bell v. Carter*, 17 Beav. 11; 22 L. J. C. 933. See *ante*, p. 280.

(c) *Kirkwood v. Thompson*, 2 H. & M. 402; 34 L. J. C. 305; see

ante, p. 151; *post*, p. 296.

(d) *Locking v. Parker*, L. R. 8 Ch. 30; 42 L. J. C. 257. See *post*, Part IV. Chap. VI, 'Limitations.'

(e) See *ante*, pp. 232, 279.

(f) *Casborne v. Scarfe*, 1 Atk. 603; 2 W. & T. L. C. 940, 956, 966. A judgment creditor who has issued a writ of *elegit* against the mortgagor before final order of fore-

The equity of redemption of a mortgage in fee was held not to be assets by descent in the hands of the heir for payment of the specialty creditors of the deceased ancestor, within the Statute of Frauds, 29 Car. II. c. 3, s. 10, which enacted that trusts in fee simple should be assets by descent. But it was made equitable assets by the Court of Chancery, upon the principle that if a specialty creditor applied to redeem, the Court would grant redemption only in favour of all the creditors equally without distinction as to priority (a).

Equity of redemption made assets in equity.

The statute 3 & 4 Will. IV. c. 104, making every estate or interest in land assets for the payment of all debts, but with priority to the specialty creditors, was held to extend to an equity of redemption in fee, thus putting it in the position of legal assets by descent (b). But the priority of the specialty creditors is now taken away by the statute 32 & 33 Vict. c. 46 (c).

The equity of redemption of a term of years or chattel interest in land retains the original quality of personal estate and passes to the executor, *virtute officii*, and is legal assets, although the right can be enforced only by suit in equity (d). The personal representative of the mortgagor of estates of inheritance has no right to redeem or file a bill for that purpose, notwithstanding the statute, 3 & 4 W. IV. c. 104, by which the real estate has been made assets for the payment of debts (e).

Equity of redemption of mortgage of term of years.

The equity of redemption, in general, follows the original title to the property and its subsequent devolu-

Effect of reservation of equity of redemption in mortgage deed.

closure is entitled to redeem the mortgage. *Mildred v. Austin*, L. R. 8 Eq. 220; *Earl Cork v. Russell*, L. R. 13 Eq. 210; 41 L. J. C. 226; *Beckett v. Buckley*, L. R. 17 Eq. 435; *Hatton v. Haywood*, L. R. 9 Ch. 229. As to redemption by a person having a partial interest only in the equity of redemption, and the form of reconveyance to be made, see *Pearce v. Morris*, L. R. 8 Eq. 217; 5 Ch. 227; 39 L. J. C. 342.

(a) Butler's note to Co. Lit. 208 b; notes to *Silk v. Prime*, 2 W & T. L. C. 116; *Plunket v. Penon*, 2 Atk. 290. See *ante*, p. 262.

(b) *Foster v. Handley*, 1 Sim. N. S. 200; 15 Jur. 73.

(c) See *ante*, p. 263.

(d) See *ante*, p. 261; *Cook v. Gregson*, 3 Drew. 547; 25 L. J. C. 706.

(e) See *ante*, p. 264; *Catley v. Sampson*, 34 L. J. C. 96; see *Clarke's Trusts*, 22 L. J. C. 230.

tions, independently of the reservation in the mortgage deed or the direction to reconvey, unless an intention of altering the title appear clearly in the deed; a merely formal reservation of the equity in variance of the former title is not sufficient for this purpose. "It may be shown on the face of a mortgage deed that there is an intention to resettle the equity of redemption, but it must be shown by something which bears expressly on that identical point" (a).

Surplus proceeds
of sale under
the mortgage.

So, also, the mortgage, though attended with an absolute power of sale or trust for sale, has no constructive effect in equity as a conversion of the land into personalty beyond the amount of the debt charged upon it. A sale would effect a conversion *de facto*, and the surplus of the proceeds would be payable to the mortgagor *in specie*; but if he died before payment and without having done anything to affirm the conversion, it would be payable to his real or personal representative, according to the quality of the property mortgaged. And in the case of a mortgage in fee, it makes no difference in the destination of the surplus that it is expressed in the deed to be payable to the mortgagor, his *executors* and *administrators* (b).

Liability of the
personal estate
of mortgagor for
mortgage debt.

Until the passing of a recent statute the rule that the personal estate is the primary fund for the payment of the debts of a deceased person extended generally to the mortgage debts; although it did not extend to such

(a) See *Betton's Trust Estates*, L. R. 12 Eq. 553; 2 Hayes Conv. 139, note; 1 Pridaux Conv. 423. Thus if husband and wife join in mortgaging the wife's inheritance, reserving the equity of redemption to the husband and his heirs, a resulting trust is presumed in favour of the wife, and her heir is entitled to redeem for his own benefit. 2 W. & T. L. C. 926, notes to *Huntingdon v. Huntingdon*. See *Jackson v. Innes*, 16 Ves. 367; 1 Bligh, 104; *Anson v. Lee*, 4 Sim. 364, where the deed was held to be more

than a mere mortgage, and to effect a transfer of the property.

(b) *Wright v. Rose*, 2 S. & S. 323; *Bourne v. Bourne*, 2 Hare, 35, where the mortgage was in the form of a trust for sale; *Clarke's Trusts*, 22 L. J. C. 230. "The power of sale is merely auxiliary to the mortgage, which in equity amounts only to a charge, leaving the surplus produce of the sale, no less than the unexhausted interest in the land, essentially real estate." 2 Hayes Conv. 144, n. (133) 5th ed.

mortgage debts as were not created by the deceased himself, (as where he purchased land charged with a mortgage debt,) unless by subsequent acts he had adopted them as his own (a).

Consequently the heir or devisee of land in mortgage was *primâ facie* entitled to have the debt discharged out of the personalty; unless the deceased had exonerated it by his will, which he might do either in express terms or by apparent intention.—And in case of a deficiency of the personal estate, the devisee of land in mortgage was entitled to have it exonerated out of the land left to descend (b).

By the statute 17 & 18 Vict. c. 113, (Locke King's Act,) it is enacted as follows:—"When any person shall, after 31st Dec. 1854, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof" (c).

Locke King's
Act making the
mortgaged land
primarily liable
for the debt.

(a) See *ante*, p. 260; *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 454; 1 W. & T. L. C. 564.

(b) 1 W. & T. L. C. 601, notes to *Duke of Ancaster v. Mayer*. 2 Jarman on Wills, 552, "and it is clear that the legatee of any chattel specifically bequeathed, has the same right" of having it exonerated out

of the general assets. *Ib.*; *Knight v. Davis*, 3 M & K. 358; *Lewis v. Lewis*, L. R. 13 Eq. 218; 41 L. J. C. 195. As to exoneration of the personalty, or of part of the real estate, see *ante*, p. 266.

(c) As to this act and the law where it does not apply, see notes to *Duke of Ancaster v. Mayer*, *supra*.

The section contains a proviso, "that nothing herein contained shall affect the rights of any person claiming under or by virtue of a will, deed, or document made before 1st Jan. 1855."—It has been decided that an heir claiming by descent a lapsed devise in a will made before that date is not a person claiming under or by virtue of a will within the proviso (*a*).

Leaseholds not within the Act.

The Act does not apply to leaseholds or to chattels real; and accordingly, in the case of the specific devise of an estate, partly leasehold and partly freehold, which was in mortgage, it was held that the debt must be apportioned between the leasehold and the freehold according to the values at the testator's death, and the sum apportioned to the leaseholds paid out of the general personalty (*b*).—

Money charged upon land.

A fund to be raised out of land under an absolute trust for conversion, if there be no option to take the land in an unconverted state, is not an interest in land within the Act, and a bequest of such fund exonerates it from a mortgage debt charged upon it, as against the general personal estate (*c*).

Equitable mortgage is within the act.

An equitable mortgage or charge by deposit of deeds is within the Act, and the land is thereby made primarily liable for the debt charged (*d*).

Act to explain "contrary intention" in will.

By the Act 30 & 31 Vict. c. 69, (to explain the operation of the above Act,) after reciting that Act, it is enacted as follows (sect. 1):—"In the construction of the will of any person who may die after 31st Dec. 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared

(*a*) *Nelson v. Page*, L. R. 7. Eq. 25; 38 L. J. C. 138.

(*b*) *Solomon v. Solomon*, 33 L. J. C. 473; *Gall v. Fenwick*, 43 L. J. C. 178.

(*c*) *Lewis v. Lewis*, L. R. 13 Eq.

218; 41 L. J. C. 195.

(*d*) *Coleby v. Coleby*, L. R. 2 Eq. 803; *Pembroke v. Friend*, 1 J. & H. 132; as to equitable mortgages, see *post*, p. 297.

by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate."—The contrary was held under the original Act after some difference of opinion (*a*).

Though this explanatory Act mentions only a general direction to pay debts out of *personal estate*, the principle of construction indicated applies to a general direction to pay debts out of any other fund; and the enactment is held to mean that a general direction as to the payment of debts is not to include mortgage debts without some further and distinct declaration that it is so intended (*b*). Accordingly, a general direction to pay debts out of the residuary real and personal estate,—or out of a mixed fund created for the payment of debts,—is within the explanatory Act, and does not import an intention contrary to the former Act (*c*).

The specific devise of part of an estate or of one of several estates, the subject of one mortgage, does not alone exonerate that part or estate as against the rest of the land charged with the same mortgage. It is held that such a devise does not alone signify an intention, within Locke King's Act, contrary to or other than the incidence of the mortgage debt proportionately upon every part of the land charged according to its value, as expressly enacted (*d*).

(*a*) See *Eno v. Tatham*, 3 D. J. & S. 443; 32 L. J. C. 311; and the cases there cited.

(*b*) See *Nelson v. Page*, L. R. 7 Eq. 25; 38 L. J. C. 138, *per* Giffard, V. C., *Gall v. Fenwick*, 43 L. J. C. 178, that the Act intended to reverse the decision of *Eno v. Tatham*, *supra*, and the principle of construction involved in it.

(*c*) *Lewis v. Lewis*, L. R. 13 Eq. 218; 41 L. J. C. 195; *Gall v. Fenwick*, *supra*. See further as to the declaration of a contrary intention, *Coote v. Lowndes*, L. R. 10 Eq.

376; 39 L. J. C. 887.

(*d*) *Gibbins v. Eyden*, L. R. 7 Eq. 371; 38 L. J. C. 377; *Sackville v. Smyth*, L. R. 17 Eq. 153; dissenting from *Brownson v. Lawrence*, L. R. 6 Eq. 1; 37 L. J. C. 351. The question in these cases was between a specific and a residuary devisee, but it seems that under the Act a specific devise must have the same construction and effect as to lands left to descend. As to the effect of a specific devise upon the incidence of debts in general, see *ante*, p. 265.

Act extended to
lien for unpaid
purchase money.

By the same explanatory Act, sect. 2, it is enacted that "in the construction of the said Act, and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator." The contrary construction was before held under the principal Act, 17 & 18 Vict. c. 113 (a); and this construction still remains in cases of *intestacy*, as the explanatory Act is restricted in terms to lands purchased by a *testator* (b).

Mortgagor in
possession is
prima facie
tenant at suf-
ferance.

A mortgagor remaining in possession after the legal conveyance to the mortgagee is, at law, merely a tenant at sufferance, unless the mortgage deed provide to the contrary. The mortgagee is entitled to enter or to bring an action of ejectment without giving any notice to quit or making any demand of possession (c).

Tenant under
mortgagor.

A tenant under the mortgagor, let into possession since the mortgage, is in the like position, unless the mortgagee have recognised and adopted his tenancy (d). As between the mortgagor and his lessee, a lease, though void as against the mortgagee, operates by *estoppel*, precluding the lessee from disputing a reversion in his lessor according to the terms of the lease, and his right to the rent, until an actual or constructive eviction by the mortgagee; and the covenants and liabilities of the lessee under the lease will run with such reversion (e).

The mortgagee cannot recover the mesne profits accrued

(a) *Hood v. Hood*, 26 L. J. C. 616.

(b) *Hudson v. Cooke*, 41 L. J. C. 306; L. R. 13 Eq. 417; *Harding v. Harding*, L. R. 13 Eq. 493; 41 L. J. C. 523.

(c) See *ante*, p. 212; *Thunder v. Belcher*, 3 East, 449; *Doe v. Giles*, 5 Bing. 421; *Doe v. Maisey*, 8 B. & C. 767; *Doe v. Lightfoot*, 8 M. & W. 553; *Doe v. Day*, 2 Q. B. 147; *Doe v. Tom*, 4 Q. B. 615.

(d) *Keech v. Hall*, Dougl. 21; 1 Smith's L. C. 505, 5th ed. See

Evans v. Elliott, 9 A. & E. 342; *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273. As to what amounts to recognition, see *Smith v. Eggington*, L. R. 9 C. P. 145; 43 L. J. C. P. 140; as to the effect of receiving rent and giving notice to quit, *Ib.*

(e) See Bullen & L. Prec. Pl. 207, and cases there cited; and see *Hickman v. Machin*, 4 H. & N. 716; 28 L. J. Ex. 310; *Morton v. Woods*, L. R. 3 Q. B. 658; 4 *ib.* 293; 38 L. J. Q. B. 81.

before he actually takes possession or does what is equivalent; for the doctrine of relation of an entry to the original title, as between disseisor and disseisee, does not apply between mortgagor and mortgagee; but upon a claim made by the mortgagee the lessee of the mortgagor may pay his rent in future to him, thereby becoming tenant to him instead of the mortgagor, and such payment will be an answer to the claim of his lessor as amounting to an eviction (a).—And it seems the tenant is also justified in paying over the arrears of rent accrued due and remaining unpaid at the time of the mortgagee claiming (b).

Claim of mortgagor to mesne profits.

The mortgage deed usually contains an express provision that the mortgagor may remain in possession until default in payment on the day appointed; he is then lawfully possessed of the intervening term (c).—The deed may also contain a further re-demise of the possession, constituting the mortgagor tenant to the mortgagee according to its terms (d); or a tenancy may be created by act or agreement subsequent to the deed (e).

Re-demise to mortgagor under mortgage deed.

Where a tenancy is thus created, the mortgagee has the remedy of distress for the certain rent or the sums payable as rent, as incident to the tenancy at common law. But the rent, with the attendant remedy of distress, is considered in equity only as a security for the mortgage debt and interest, and the mortgagee will be restrained from enforcing such remedy, unless the

Power to distrain for rent.

As security for debt and interest.

(a) *Litchfield v. Ready*, 5 Ex. 939; *Wilton v. Dunn*, 17 Q. B. 294; 21 L. J. Q. B. 60.

(b) *Pope v. Biggs*, 9 B & C. 245; *Johnson v. Jones*, 9 A. & E. 809; see *Wheeler v. Branscombe*, 5 Q. B. 373.

(c) *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(d) *Doe v. Day*, 2 Q. B. 147; *Doe v. Cox*, 11 Q. B. 122; *Pinhorn v. Sonster*, 8 Ex. 763; 22 L. J. Ex. 266. In the two last cases the

mortgage deed expressly provided that the mortgagor should hold the premises as tenant at will of the mortgagee at a yearly rent; and see *Morton v. Woods*, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81; *Jolly v. Arbuthnot*, 4 D. & J. 224; 28 L. J. C. 547, where the tenancy was created to a receiver on behalf of the mortgagee.

(e) See *West v. Fritche*, 3 Ex. 216; *Clowes v. Hughes*, L. R. 5 Ex. 160; 39 L. J. Ex. 62.

mortgagor is in default; nor can the mortgagee exact the full payment of the rent towards the discharge of the principal, unless it be expressly provided in the deed that it may be so applied (*a*).

Power to distrain
for interest.

A special power is sometimes given to distrain for arrears of interest, "in like manner as for rent," without creating a tenancy to which it might be incident (*b*). It then operates merely as a personal licence to take the goods of the mortgagor and deal with them in the manner of a distress, and does not carry with it all the rights and consequences of a distress at common law; and accordingly under such power of distress the goods of a third party cannot be seized upon the premises; nor does the exercise of such a power operate, like a distress, in recognition of a tenancy (*c*).

Mortgagor in
possession, in
equity, con-
sidered as
owner.

Injunction
against impair-
ing the security.

In equity the possession of the mortgagor is referred to his equitable title, and he is *prima facie* entitled to do any acts incident to ownership, as cutting timber, etc. But the court will grant an injunction to restrain acts of waste, if it be made to appear that such acts substantially impair the sufficiency of the security (*d*).

Mortgagor not
bound to ac-
count for rents
and profits.

The mortgagor is not bound to account for the rents and profits received by him while he remains in possession, notwithstanding the security may have become insufficient. "He receives the profits of the land for

(*a*) *Hampson v. Fellows*, L. R. 6 Eq. 575; 37 L. J. C. 694; see *Jolly v. Arbuthnot*, 4 D. & J. 224; 28 L. J. C. 547.

(*b*) *Doe v. Olley*, 12 A. & E. 481; *Doe v. Tom*, 4 Q. B. 615; *Metropolitan Counties Ass. v. Brown*, 4 H. & N. 428; 28 L. J. Ex. 340; see *Jolly v. Arbuthnot*, 4 D. & J. 224; 28 L. J. C. 547.

(*c*) *Doe v. Goodier*, 10 Q. B. 957; *Freeman v. Edwards*, 2 Ex. 732; see *Gibbs v. Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273.

(*d*) *King v. Smith*, 2 Hare, 239.

As to the sufficiency of value the court said, *ib.* p. 243:—"No mortgagee, who is well advised, would lend his money, unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would, probably, require more. It is rather a question of prudence than of value." And see the ordinary rule stated in 1 *Prideaux Convey.* 457.

his own use, and not as agent or bailiff of the mortgagee ; and when he has once received them, he is absolutely entitled to keep them as his own" (a).

By the Supreme Court of Judicature Act, 1873, (36 & 37 Vict. c. 66,) s. 25, subs. (5)—"A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

Mortgagor in possession may sue in his own name.

Until final order of foreclosure, the mortgagee though absolute owner at law, is entitled in equity only to a charge upon the land to the amount of the mortgage debt, interest, and costs. This includes not only the ordinary charges and expenses usually provided for by the instrument, but also the costs (if any) incident to realising the security, as those properly incurred in a foreclosure or redemption suit. The mortgagee is allowed all such costs in account, and the mortgagor cannot redeem without paying them (b).

Charge of mortgagee for debt, interest and cost.

The mortgage debt and charges, thus constituting the mortgagee's interest in the land in equity, is of the nature of personal estate, and passes on death to his personal representative (c).

Is personal estate.

(a) *Per* Campbell, L. C., *Jolly v. Arbuthnot*, 4 D & J. 224; 28 L. J. C. 547, citing *Trent v. Hunt*, 9 Ex. 14; 22 L. J. Ex. 318; *Colman v. Duke St. Albans*, 3 Ves. 25; *Ex. p. Wilson*, 2 V. & B. 252; *Paget v. Anglessea*, L. R. 17 Eq. 283; 43 L. J. C. 437.

(b) *Cotterell v. Stratton*, L. R. 8 Ch. 295; 42 L. J. C. 417; *Cook v.*

Hart, L. R. 12 Eq. 459; 41 L. J. C. 143; *Cottrell v. Finney*, 43 L. J. C. 562. In the case of an administration suit, see *Spensley v. Harrison*, L. R. 15 Eq. 16; 42 L. J. C. 21; *Pinchard v. Fellows*, 43 L. J. C. 227; L. R. 17 Eq. 421.

(c) Butler's note to Co. Lit. 208 b; *Thornbrough v. Baker*, 1 Ch. Ca. 283; 2 W & T, L. C. 935,

- Legal estate of mortgagee.** The legal estate in the land, upon a mortgage in fee, passes to the heir or devisee of the mortgagee, who becomes a trustee for the personal representative or person beneficially entitled to the debt and charges, but subject always to the equity of redemption of the mortgagor.
- Power of sale.** Hence the power of sale is usually given to the mortgagee, *his executors, administrators, and assigns*, or the person for the time being entitled to give a discharge for the debt, with a declaration that the heir or legal owner shall concur in the conveyance. The power of enforcing the security by a sale is thereby made to accompany the debt (a).
- Devise by mortgagee.** A general devise of real estate passes estates held in mortgage, unless a contrary intention is expressed, or must be implied from the purpose of the disposition (b).
- Conveyance by vesting order of Court.** The difficulty of following the legal title in order to obtain a reconveyance of the lands mortgaged is provided for in certain cases, by the statute 13 & 14 Vict. c. 60, (The Trustee Act, 1850,) s. 19, which enacts to the effect that when a mortgagee has died without entering into possession, and the money due has been paid to a person entitled to receive the same, or such person shall consent, the Court of Chancery may make an order vesting such lands in such person and for such estate as the court shall direct, in cases where the heir or devisee of the mortgagee cannot be found, or ascertained, or refuses to convey, with the same effect as if the heir or devisee had duly executed a conveyance of the lands (c). The court has power to make a like vesting order when the land has become vested in a lunatic (sect. 3)—or in an infant (sect. 8).

(a) 2 Hayes Conv. 141 n. (131); 1 Prideaux Conv. 432; if there be several mortgagees, the power is given to them jointly, and to the survivors and survivor of them and the executors or administrators of the survivor or their assignee, *ib.* See *Saloway v. Strawbridge*, 7 D. M. & G. 594; 25 L. J. C. 121; *Hind v. Poole*, 1 K. & J. 383.

(b) See 1 Jarman on Wills, 633, 638. Where see as to the construction of terms "mortgages," "securities for money," and the like in passing the beneficial interest or legal estate; and see Hawkins on Wills, 35, 48; *Steven's Will*, 41 L. J. C. 537, and cases there cited.

(c) See *Boden's Trusts*, 1 D. M. & G. 57; 21 L. J. C. 316.

By the Vendors and Purchasers Act, 1874, 37 & 38 Vict. c. 78, s. 4, "The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust."

A mortgagee who takes possession under his legal title is bound to account for all the rents and profits actually received by him, or which he ought to have received (a). In general, if the mortgagee takes possession, without any interest due or other sufficient cause for entering, he must account with annual rests; that is to say, the surplus receipts after payment of interest will be applied annually in discharge of principal, leaving interest to run only on the balance; he is presumed to enter to secure his principal. But if he enters because the interest is in arrear, or for the protection of his security, or other sufficient cause, he is not bound to receive payment in this mode, and he may continue to charge interest in full until the whole debt is discharged (b).

Mortgagee in possession is bound to account for rents and profits.

Account with annual rests.

On the other hand, he is entitled to charge in account the costs of all necessary repairs and of the necessary maintenance of the property mortgaged, and of the protection of the title (c);—he may employ all necessary agents or receivers and charge for their payment;—but he is not entitled to charge any profit or remuneration for his personal services or trouble (d).

May charge cost of repairs, etc.

Not personal remuneration.

(a) Notes to *Thornbrough v. Baker*, 2 W. & T. L. C. 975.

3 D. & J. 119; 27 L. J. C. 782, per Turner, L. J.; *Thompson v. Hudson*, L. R. 10 Eq. 497.

(b) 2 W. & T. L. C. 974, notes to *Thornbrough v. Baker*; Seton on Decrees, 227, 2d ed.; Coote on Mortgages, 530, 3rd ed.; *Wilson v. Cluer*, 3 Beav. 140; *Patch v. Wild*, 30 Beav. 99; see *Nelson v. Booth*,

(c) 2 W. & T. L. C. 976, notes to *Thornbrough v. Baker*; *Sandon v. Hooper*, 6 Beav. 246.

(d) *Leith v. Irvine* 1 My. & K. 277, 286; see *ante*, p. 148.

Statutory power to insure and charge premiums.

By the 23 & 24 Vict. c. 145, (Lord Cranworth's Act,) the mortgagee, where any principal money is secured or charged by deed on any hereditaments, has power to insure the mortgaged property from loss by fire, and add the premiums paid for any such insurance to the principal money secured at the same rate of interest: unless it be declared in the deed to the contrary (sect. 11). Before this enactment the mortgagee could not charge insurance, except by express contract to that effect (a).

To appoint receiver.

—By the same enactment the mortgagee has power to appoint or obtain the appointment of a receiver of the rents and profits of the property in the manner provided in the Act (sects. 11, 17-24).—But it may be declared in the deed that these powers shall not take effect, or shall be varied and limited (sect. 32).

Distinction between a mortgagee and a trustee.

It may here be noticed that “between mortgagee and mortgagor there is nothing analogous to a trust, until the whole mortgage debt has been paid and satisfied; from which moment, and not until then, the mortgagee becomes a trustee for the mortgagor” (b).—The mortgagee may therefore, in general, purchase from the mortgagor or from a prior mortgagee exercising power of sale; and that whether he be in possession or not (c).—There is no trust to prevent the Statute of Limitations from operating in his favour (d).—Nor is the mortgagee constituted a trustee for the mortgagor by his

(a) *Dobson v. Land*, 8 Hare 216; *Bellamy v. Brickenden*, 2 J. & H. 137.

(b) *Per Wood*, V. C., in *Kirkwood v. Thompson*, 34 L. J. C. 305, 308; 2 H. & M. 402; and see 2 J. & W. 182, *Cholmondeley v. Clinton*, and *Dobson v. Land*, 8 Hare, 216, as to the position of a mortgagee in this respect.

(c) *Knight v. Majoribanks*, 2 Mac. & G. 10; *Shaw v. Bunny*, 34 L. J. C. 257; *Kirkwood v. Thomp-*

son; supra; see *ante*, p. 151; but see *Ford v. Olden*, L. R. 3 Eq. 461; 36 L. J. C. 651, where a sale of the equity of redemption to the mortgagee was set aside upon the ground of pressure caused by the relationship and inadequacy of consideration.

(d) See 3 & 4 Will. IV. c. 27, ss. 25, 28; *Locking v. Parker*, L. R. 8 Ch. 30; 42 L. J. C. 257. See *post*, Part IV. Chap. VI. ‘Statutes of Limitations.’

mortgage being framed in the form of a conveyance upon trust to sell (a).

Land may be charged in equity as security for a debt by deposit of the title deeds, without a legal conveyance, thereby creating what is called an *equitable mortgage* (b). Equitable mortgage by deposit of deeds.

The effect of a deposit of deeds in charging the land is regulated by the agreement, express or implied, upon which it is made.—The agreement may be proved by parol evidence, notwithstanding the Statute of Frauds, (29 Car. II. c. 3, s. 4, which requires a contract or sale of any interest in land to be in writing signed); the fact of the adverse possession of the deeds admitting of explanation independently of the statute (c). Agreement as to the deposit.

The fact of depositing the deeds in the hands of a creditor is evidence between the parties of an agreement to secure the debt due or then created; and further advances are presumptively made upon the same security (d). Deposit is presumptive evidence of mortgage.

But the mere possession of the deeds by a creditor, without evidence of a deposit by the debtor or any connection between the possession and the debt, is not sufficient to create an equitable mortgage (e).—If it appear that the deposit was made for the purpose of obtaining future advances, it cannot be retained for a past debt (f).

Where a deposit is accompanied by an agreement in writing, the document becomes the exclusive evidence of the terms of the security (g). But a subsequent agree- Agreement in writing.

(a) See *ante*, p. 283.

(b) See this transaction explained, and that an interest is given in the land itself and not merely in the deeds, *per* Eldon, L. C., 19 Ves. 211, *Ex p. Whitbread*.

(c) *Russel v. Russel*, 1 Bro. C. C. 269; 1 W. & T. L. C. 603.

(d) *Ex p. Mountfort*, 14 Ves. 606; *Ex p. Langston* 17 Ves. 227; *Ex p. Whitbread*, 19 Ves. 209; *Ex p. Kensington*, 2 V. & B. 79.

(e) *Chapman v. Chapman*, 13

Beav. 308; 20 L. J. C. 465. So, the possession of personal chattels or securities creates no lien without an agreement express or implied to that effect. *Leese v. Martin*, L. R. 17 Eq. 224; 43 L. J. C. 193.

(f) *Mountfort v. Scott*, Turn. & R. 274.

(g) *Ex p. Coombe*, 17 Ves. 369; *per* Lord Cairns, L. R. 5 H. L. 340, *Shaw v. Foster*; see *Burton v. Gray*, L. R. 8 Ch. 932, 43 L. J. C. 229, where it was held that the

Subsequent variation.

ment may extend or alter the terms upon which the deposit is held; and the continuance of the deposit will support such subsequent agreement, though not proved by writing within the Statute of Frauds; as in the case of subsequent advances made upon the deposit (a).

Deposit for purpose of making legal mortgage.

A delivery of deeds for the purpose of preparing a legal mortgage is held to constitute a valid equitable mortgage for the money advanced, until the legal mortgage is executed (b). But further advances upon a legal mortgage cannot be secured without the evidence in writing required by the Statute of Frauds, because after the mortgage is executed the deeds are held by the mortgagee in right of ownership, and not on deposit (c).

Remedy of equitable mortgagee, by foreclosure.

The remedy of an equitable mortgagee by deposit of deeds is *primâ facie* by foreclosure upon the usual terms, with a conveyance at the expense of the mortgagor; and not by sale (d). The remedy for a mere equitable charge on land, without deposit, is *primâ facie* by sale (e).

Specific performance of agreement to give mortgage, etc.

If the deposit be accompanied by an agreement to give a legal mortgage with usual powers, it will be specifically enforced according to its terms; and the court will decree specific performance of an agreement to execute a mortgage with an absolute and immediate power of sale (f).—Where a deposit of deeds was made for the purpose of indemnifying a surety, it was held that

deposit created no charge for the money advanced, because the mode of advance did not comply with the terms of the written agreement.

(a) *Ex p. Whitbread*, 19 Ves. 209; *Ex p. Kensington*, 2 V & B. 79; *James v. Rice*, 5 D. M. & G. 461; 23 L. J. C. 819.

(b) *Hockley v. Bantock*, 1 Russ. 141; 1 W. & T. L. C. 609, notes to *Russel v. Russel*, and the cases there cited.

(c) *Ex p. Hooper*, 1 Mer. 7.

(d) See *ante*, p. 280; Seton on Decrees, 444, 3rd ed.; *James v. James*, L. R. 16 Eq. 153; 42 L. J.

C. 386; *Pryce v. Bury*, ib. in note; 23 L. J. C. 676. The decree allows six months to redeem, *Parker v. Housefield*, 2 M. & K. 419; although no interest be payable, *Meller v. Woods*, 1 Keen, 16. In a suit for foreclosure the court may order a sale. See *ante*, p. 282.

(e) *Ante*, p. 280; see *Matthews v. Goodday*, 31 L. J. C. 282; 8 Jur. (N.S.) 90.

(f) See *Matthews v. Goodday*, 31 L. J. C. 282; *Ashton v. Corrigan*, L. R. 13 Eq. 76; 41 L. J. C. 96; *Herman v. Hodges*, L. R. 16 Eq. 18; 43 L. J. C. 192.

before any liability had been incurred, he was only entitled to have a memorandum signed stating the purpose of the deposit, and was not entitled to have a legal mortgage executed (a).

On the other hand, an equitable mortgagee by deposit cannot be compelled to accept a legal mortgage whereby he might incur liability as tenant of the legal estate; as by the assignment of a lease subject to rent and covenants; nor does he by taking a deposit of the lease as security incur any liability under it to the lessor, nor although he may have entered into possession of the land; the relation of landlord and tenant being purely legal and not equitable (b).

Equitable mortgagee not compellable to take the legal estate.

An agreement to execute a mortgage, or an agreement to deposit deeds as security for a debt, without actual deposit, gives the right in equity to specific performance, and so creates an equitable mortgage (c). But a mere agreement for a mortgage or for a deposit, without actual deposit, must be proved by writing signed by the party to be charged therewith, under the Statute of Frauds (d).

Equitable mortgage by agreement without deposit.

Agreement must be proved by writing.

The above doctrines concerning mortgages have been

(a) *Sporle v. Whyman*, 20 Beav. 607; 24 L. J. C. 789.

(b) *Moores v. Choat*, 8 Sim. 508; *Moore v. Greg*, 2 De G. & S. 304; 2 Ph. 717, overruling *Lucas v. Comerford*, 3 Bro. C. C. 166, 8 Sim. 499; see *Cox v. Bishop*, 8 D. M. & G. 815; 26 L. J. C. 389.

(c) See *per* Kindersley, V. C., in *Matthews v. Goodday*, 31 L. J. C. 282; *Daws v. Terrell*, 33 Beav. 218; *Tebb v. Hodge*, 38 L. J. C. P. 217; 39 *ib.* 56; L. R. 5 C. P. 73. Such an agreement is a charge upon the land within the Registry Acts, *Wight's Mortgage Trust*, L. R. 16 Eq. 41; 43 L. J. C. 66. As to priority between an equitable mortgage without the deeds and an equitable mortgage with deposit of deeds, see *Dixon v. Muckleston*, L.

R. 8 Ch. 155; 42 L. J. C. 210; and see *post*, Chap. II. Sect. VI. 'Priority of Equitable Estates.'

(d) *Ante* p. 297; *Ex p. Coombe*, 4 Madd. 249. Where certain deeds were deposited and a letter was written stating that they were the title deeds of an estate, and had been deposited as security for a loan, it was held that, though the deeds were not really the title deeds of the estate, the letter constituted a good equitable mortgage upon it; *Selborne, L. C.*, said, "It is a security created by an express writing under the hand of the owner in fee sufficient to satisfy the Statute of Frauds, and raising none of the questions which a security by mere deposit might have raised." *Dixon v. Muckleston*, *supra*.

stated generally with reference to freehold estates; but they are applicable for the most part to mortgages of any other subjects of property; though the form of the mortgage must necessarily vary in some degree according to the subject, whether freehold, copyhold or leasehold, or a merely equitable estate or interest.

Mortgage of copyholds.

A mortgage of copyholds usually takes the form of a conditional surrender. A surrender is made to the use of the mortgagee, but subject to the condition that on payment of principal and interest on a certain day the surrender shall be void. The mortgagee does not take admittance, except upon foreclosure, and therefore incurs no fine or liability for the rents and services. Upon redemption, satisfaction of the condition is entered upon the rolls and the surrender is thereby vacated, leaving the mortgagor in admittance as before. A separate deed of mortgage is executed covenanting to surrender as above, and in other respects in the form of a usual mortgage deed adapted to the copyhold security (*a*).

Equitable mortgage of copyholds.

An equitable mortgage of copyholds may be made by deposit of the copies of the Court Rolls relating to the title (*b*).

Mortgage of leaseholds.

A mortgage of leaseholds may be made by an assignment of the whole term and interest of the mortgagor, subject to the proviso for redemption and other conditions of a mortgage, in strict analogy with a mortgage in fee simple.—Or it may be made in the form of an underlease by the mortgagor to the mortgagee for a period less than the whole term; in which form the mortgagee avoids incurring the liability, as assignee of the lease, for the rent and covenants contained in it (*c*).

(*a*) Scriven on Cop. 194; 1 Prideaux Conv. 422, 490, 7th ed.; see *post*, Part IV. Chap. I., 'Conveyance of Copyholds.'

(*b*) *Ex p. Warner*, 19 Ves, 202;

Whitbread v. Jordan, 1 Y. & C. Ex. 303; see *Pryce v. Bury*, 23 L. J. C. 676.

(*c*) 2 Hayes Convey. 127, 5th ed.; 1 Prideaux Conv. 423, 7th ed.

A mortgage of equitable estates and interests in land is commonly effected by conveyance or assignment in the form applicable to the analogous legal estate or interest, and with the same terms and conditions as a legal mortgage, so far as the same are applicable (a).—An equitable interest created by a contract may be mortgaged by a deposit of the contract, in analogy with a mortgage by deposit of title deeds, as by deposit of a contract for the purchase of an estate or for a lease; and such mortgage is subject to the same rules and incidents as an equitable mortgage by deposit of deeds (b).

Mortgage of equitable estates and interests.

With respect to assignments of equitable interests, it is to be observed, that if the subject of property be of the nature of personal chattels, passing by transfer of possession, it is necessary to do what is tantamount to obtaining possession, that is, to give notice of the assignment to the trustee and thus convert him into a trustee for the assignee, in order to perfect the assignment as against unknown or subsequent claimants, who by giving a prior notice might obtain priority. Such is the case with an assignment or mortgage of money charged upon land, or the proceeds of land under trust for conversion, which interests are of the nature of personalty; notice must be given to the trustee in order to perfect the title as against other claimants (c).

Notice of mortgage to the trustee.

But if the subject of assignment be an equitable estate or interest in the land itself, corresponding with a legal estate or interest, though the legal estate be outstanding, no notice is necessary to be given to the trustee or legal owner in order to complete the assignment, for assignments of such equitable estates, in analogy with legal conveyances, take priority according to the time of execution. Thus, with the equity of redemption of a mortgage

Notice not necessary with equitable estate in the land.

(a) See *ante*, p. 142; see *post*, Part IV. Chap. I. 'Conveyance of Equitable estates.'

27 L. J. C. 585.

(b) See *ante*, p. 297; *Unity Banking Ass. v. King*, 25 Beav. 72;

(c) *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, *ib.*; *Hughes' Trusts*, 2 H. & M. 89; 33 L. J. C. 725.

in fee, a subsequent mortgagee obtains no priority over an intermediate one, by giving notice to the legal mortgagee; but the mortgagees, in the absence of special circumstances, rank in order of time (*a*).

§ 5. EQUITABLE ESTATES AND INTERESTS ARISING OUT OF CONTRACTS OF SALE.

Vendor trustee for specific performance—equitable estate of purchaser—vendor liable to account.

Lien of vendor for unpaid purchase money—discharge of lien by taking other security.

Lien of purchaser for deposit—claim to return of deposit.

Conversion of the land by contract of sale—depends upon liability of vendor to specific performance—devise of land contracted to be sold—effect of compulsory sale.

Conversion of the purchase money by the contract—depends upon liability of purchaser to specific performance—purchase money primarily charged upon the land purchased under Locke King's Act.

Vendor becomes trustee for specific performance.

A contract of sale, of which a court of equity would decree specific performance, gives rise to various trusts and equities. The vendor from the time of executing the contract holds the land upon trust for the performance of it according to its terms and conditions (*b*); and may be restrained at the suit of the purchaser from selling or conveying the land to another (*c*).—Any person taking a conveyance from the vendor with notice of the

(*a*) *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare, 14; *Wiltshire v. Rabbits*, 14 Sim. 76; see *post*, Chap. II. Sect. VI, 'Priority of Equitable Estates'; and Part IV. Chap. I. 'Assignment of Equitable Estates.'

(*b*) Sugden's V. & P. 175, 14th ed.; see *M'Creight v. Foster*, L. R. 5 Ch. 604; 39 L. J. C. 792;

S. C. nom. *Shaw v. Foster*, L. R. 5 H. L. 321, and cases there cited; see *per* Westbury, L. C., in *Holroyd v. Marshall*, 33 L. J. C. 193; 10 H. L. C. 191; where the same principle was extended to after-acquired property.

(*c*) See *Hadley v. London Bank of Scotland*, 3 De G. J. & S. 63.

contract would be bound by the same equity or trust for performance as the vendor (a).

Equity regards the property under contract for sale as if the contract were carried out according to its terms. Land which ought to have been conveyed is regarded as the property of the purchaser; who may thus acquire the equitable estate in fee simple or other interest contracted for by virtue of the contract without any technical limitation (b). Any subsequent deterioration or improvement of the property *primâ facie* accrues to the purchaser, as owner; as a loss by fire, according to the maxim "*damnum ex casu sentit dominus*" (c).

Accordingly, the vendor remaining in possession after the time appointed for the completion of the contract is, in general, bound to account to the purchaser for the rents and profits actually received, or which with proper management he ought to have received, and he may be charged with an occupation rent; he may also be made liable for deterioration and dilapidation caused by his own negligence. But he is entitled to credit for all proper expenditure in maintaining the property in a proper condition; and he is entitled to interest on the purchase money while it remains due and unpaid (d).

If the purchase money or any part of it remains unpaid after conveyance, the vendor has an equitable lien or charge upon the land conveyed for the amount, and the purchaser holds the land subject to such lien; unless

(a) *Barnes v. Wood*, L. R. 8 Eq. 424; 38 L. J. C. 683. See *ante*, p. 143.

(b) *Treatise of Equity* by Fonblanque, ch. 6, s. 9, see *ante*, p. 141; *Bower v. Cooper*, 2 Hare 408.

(c) *Paine v. Meller*, 6 Ves. 349; see *Dart, V. & P.* 596, 3rd ed. So the purchaser of a life annuity bears the loss caused by the death happening after the time for completion. *Kenney v. Wenham*, 6 Madd. 355. See *Jackson v. Lever*, 3 Bro. C. C.

605.

(d) *Dyer v. Hargrave*, 10 Ves. 505; *Sherwin v. Shakespeare*, 5 D. M. & G. 517; 23 L. J. C. 898; *Thomas v. Burton*, L. R. 8 Eq. 120; 38 L. J. C. 709; *Phillips v. Silvester*, L. R. 8 Ch. 173; 42 L. J. C. 225. He is in a position analogous to a person holding possession of land on which he has security, *per Selborne, L. C., ib.* See *ante*, p. 295.

it be excluded by the express terms or manifest intention of the contract (a).

Discharge of
lien by taking
other security.

The lien for unpaid purchase money, under the general rule, may be discharged by the vendor taking other security, at the time of the purchase or afterwards, in substitution for it. "The question is then not merely upon the fact whether a security was taken, but it depends upon the circumstance of each case whether the court is to infer that the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken" (b).—Accordingly the lien is not lost by the vendor merely taking a bond or note or a real security for the purchase money; or by his taking a security for payment at a future day (c).

Payment by
annuities.

Where the consideration for the sale is to be paid in the form of an annuity for life or lives, though the lien is not necessarily excluded, yet the presumption is against any intention to create a permanent charge on the estate for the periodical payments during the continuance of the annuity; and the vendor is presumptively entitled only to the bond, covenant, or security for the annuity provided in the contract (d).

(a) The doctrine of lien for unpaid purchase money is thus stated by Eldon, L. C.:—"Where the vendor conveys, without more, though the consideration is upon the face of the instrument expressed to be paid, and by a receipt endorsed upon the back, if it is the simple case of a conveyance, the money, or part of it, not being paid,—upon the doctrine of this Court, which when it is settled, has the effect of contract, though perhaps no actual contract has taken place, a lien shall prevail; in the one case for the whole consideration; in the other, for that part of the money which was not paid.—The lien exists, unless an intention, and a manifest intention, that it shall not exist appears." 15 Ves. 337, in

Mackreth v. Symmons; and see *per* Cranworth, L. C., *Dixon v. Gayfere*, 1 D. & J. 655; 27 L. J. C. 148; *per* Bacon, V. C., *re Albert Ins. Co.* L. R. 11 Eq. 164, 179; 40 L. J. C. 166, 171.

(b) *Per* Eldon, L. C., 15 Ves. 350, *Mackreth v. Symmonds*; and see notes to that case in 1 W. & T. L. C. 284–292, 3rd ed.

(c) *Mackreth v. Symmons*, *supra*; *Dixon v. Gayfere*, *supra*; *Winter v. Lord Anson*, 3 Russ. 488; Sugden V. & P. 862, 11th ed.

(d) *Per* Eldon, L. C., 15 Ves. 351, *Mackreth v. Symmons*; *Dixon v. Gayfere*, 1 D. & F. 655; 27 L. J. C. 148. In the case of purchase money, the purchaser could free the estate at any time by payment of a gross sum, but where it was an an-

The lien extends to lands taken by a railway company under the compulsory powers of purchase given by the Lands Clauses Act;—and the deposit required to be made and the bond to be given under the Act, as security for the purchase money of the land taken, does not discharge the lien of the vendor (*a*)

Lien under compulsory sale.

The lien for unpaid purchase money charges the land, not only as against the purchaser himself, but also as against a subsequent purchaser from him (except a purchaser for value without notice that the money was unpaid); “for there is no difference between this species of lien and other equities by which third persons having notice are bound” (*b*).

Lien against subpurchaser with notice.

Upon the like principle, upon payment of a deposit or purchase money before conveyance, the purchaser *prima facie* acquires a lien for the amount upon the land in the hands of the vendor, in the event of the contract being subsequently rescinded, or failing without any default on his part (*c*).

Lien of purchaser for deposit or purchase money paid before conveyance.

The claim to a return of the deposit stipulated to be paid by the contract of sale may be expressly provided for in certain events by the terms of the contract; and if

Claim to deposit under the contract.

nuity for lives the court should be slow to hold that the vendor could say the estate was inalienable so long as any of the annuitants are alive. *Per* Cranworth, L. C. *Ibid.*

(*a*) *Walker v. Ware & Buntingford Ry. Co.* L. R. 1 Eq. 195; 35 L. J. C. 94; *Wing v. Tottenham & Hampstead Ry. Co.* L. R. 3 Ch. 740; 37 L. J. C. 654; *Munno v. Isle of Wight Ry. Co.* L. R. 5 Ch. 414; 39 L. J. C. 522.

(*b*) *Per* Eldon, L. C., 15 Ves. 350, *Mackreth v. Symmonds*; see *ante*, p. 143. *Rice v. Rice*, 2 Drew. 73.

(*c*) *Wythes v. Lee*, 3 Drew. 396; 25 L. J. C. 177; notes to *Mackreth v. Symmonds*, *supra*, 293; *Rose v. Watson*, 10 H. L. C. 672; 33 L. J.

C. 385. The operation of a contract of sale in equity being “that the ownership is transferred subject to the payment of the purchase money, every portion of the purchase money paid in pursuance of the contract is a part performance of the contract, and to the extent of the purchase money so paid does in equity finally transfer to the purchaser the ownership of a corresponding portion of the estate.” *Per* Westbury, L. C. *Ib.* See *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. Ap. 101, 109; where it was held that a subpurchaser might establish a lien for purchase money advanced to the extent of the lien of the original purchaser,

Upon rescission
of contract.

the contract so provide it may be forfeited (a). Where the contract is rescinded by agreement, the claim to the deposit must be referred to the terms of that agreement; and if the rescission be unconditional, no claim can be made for a return (b).

Jurisdiction of
Court to order
return of de-
posit.

Where a contract is rescinded by the court on the ground of fraud, misrepresentation, or any like cause, it is within the jurisdiction of the court to order the deposit to be returned, and to declare it to be a lien upon the land, with interest (c). On a sale made by order of the court, which failed by reason of the bankruptcy of the purchaser and the refusal of his assignees to complete, an order was made by the court declaring the deposit to be forfeited, although the conditions of sale contained no provision as to forfeiture (d).

Lien as against
purchaser with
notice.

The lien charges the land as against a subsequent purchaser or mortgagee from the vendor having notice of the payments made (e).

Conversion by
contract of sale.

A contract of sale of which a court of equity would decree specific performance further operates in equity as a conversion, according to the terms of the contract, of the land into money on the part of the vendor, and of the amount of purchase money into the land on the part of the purchaser (f).

Of the land into
money.

The right of the vendor to the performance of the contract, or payment of the purchase money is personal estate; and if he die before completion it devolves upon his personal representative who may enforce it by

(a) *Beavan v. M'Donnell*, 9 Ex. 309; *Palmer v. Temple*, 9 A. & E. 508; *Hinton v. Sparkes*, L. R. 3 C. P. 161; 37 L. J. C. P. 81; *Casson v. Roberts*, 31 Beav. 613; 32 L. J. C. 105.

(b) See *Lee v. Page*, 30 L. J. C. 857; *Grimman v. Legge*, 8 B. & C. 324.

(c) *Torrance v. Bolton*, L. R. 14

Eq. 124; 8 Ch. 118; 41 L. J. C. 643; as to the claim for interest, see *ante*, p. 269.

(d) *Depree v. Bedborough*, 4 Giff. 479; 33 L. J. C. 134.

(e) *Watson v. Rose*, 10 H. L. C. 672; see *ante*, p. 143, 305.

(f) 1 W. & T. L. C. 754, in notes to *Fletcher v. Ashburner*; as to Conversion, see *ante*, p. 248.

suit for specific performance against the purchaser ; in which suit the heir at law or devisee of the legal estate must be joined, and may be compelled to execute a conveyance (a).

The conversion depends upon the contract. If the contract is such as a court of equity would decree to be specifically performed against the vendor at the time of his death, the conversion is then absolute as between his real and personal representatives. And it is immaterial that afterwards the contract is not in fact completed ;— as where it was properly abandoned by the purchaser by reason of not being able to get the conveyance executed by parties on whom the legal estate devolved (b) ;— or where the purchaser subsequently lost his right to specific performance by delay (c).

If at the time of the death of the vendor the contract is in terms future or conditional as to completion, the conversion is not absolute until the time has elapsed or the condition has been fulfilled. Thus, if the contract appoints a future day for completion, before which the vendor dies, the rents accruing between his death and the day appointed remain part of his real estate passing to his heir or devisee, and not to his executor (d). So, if the contract gives the purchaser a future option, as in the case of a lease for years with an option to the lessee to purchase at any time during or at the expiration of the term, the conversion takes effect only from the time of the purchaser exercising his option, and the land in the meantime descends to the heir or passes to the devisee (e).

(a) *Farrar v. Winterton*, 5 Beav. 1 ; *Roberts v. Marchant*, 1 Hare, 547 ; *Hoddel v. Pugh*, 33 Beav. 489. The amount of the purchase money is legal assets in the hands of the executor and liable to probate duty. *Att.-Gen. v. Brunning*, 8 H. L. C. 243 ; 30 L. J. C. 379 ; see *ante*, p. 261.

(b) *Tebbutt v. Voules*, 6 Sim. 40 ; in which case it was decreed, with consent of the heir, that the estate

should be sold for payment of testator's debts.

(c) *Currie v. Bowyer*, 5 Beav. 6 n., in which case it was held that the estate belonged to the next of kin.

(d) *Shadforth v. Temple*, 10 Sim. 184 ; *Lumsden v. Fraser*, 12 Sim. 263 ; see *Watts v. Watts*, L. R. 17 Eq. 217 ; 43 L. J. C. 77.

(e) *Lawes v. Bennett*, 1 Cox, 167 ; *Townley v. Bedwell*, 14 Ves. 591 ;

No conversion unless specific performance can be enforced.

If the contract is such that a court of equity would not give the purchaser specific performance there is no conversion, and the heir or devisee of the vendor may retain the land (a). But in a case where the heir of the vendor adopted a parol contract which he might have repudiated as not satisfying the requirements of the Statute of Frauds, and completed the sale, it was held that the purchase money was personal estate and belonged to the next of kin (b).

Devise of land revoked by contract of sale.

Accordingly, a devise of the land is revoked, as to the beneficial interest by a subsequent contract to sell it, though not completed at the testator's death; and the devise will not apply to the purchase money, or to the lien of the vendor upon the land which is merely a security for the purchase money (c). If the contract is conditional upon an option in the purchaser, the devise takes effect only until the exercise of the option, and is then revoked in favour of the personal representative (d). So also, if the completion of the contract is postponed to a future time, the devise operates until the time of completion (e).

Devise of land under contract for sale.

A devise of land, after a contract of sale made which is not completed at the testator's death, operates, like a devise of land of which the testator is only trustee, in

Collingwood v. Row, 26 L. J. C. 649; 3 Jur. N. S. 785. See *Weeding v. Weeding*, 1 J. & H. 424; 30 L. J. C. 680.

(a) See *Roberts v. Marchant*, 1 Hare, 547, for which reason the heir or devisee must be joined in a suit against the purchaser, though the legal estate be outstanding, as the purchaser is entitled to have the contract established against them.

(b) *Frayne v. Taylor*, 33 L. J. C. 228.

(c) *Tebbutt v. Voules*, 6 Sim. 40; *Moor v. Raisbeck*, 12 Sim. 123; *Farrar v. Earl of Winterton*, 1 Beav. 1, where L. Langdale, M. R., speaking of a testatrix who after de-

vising an estate had contracted to sell it, said:—"In equity she had alienated the land, and instead of her beneficial interest in the land, she had acquired a title to the purchase money. What was really hers in right and equity was, not the land but the money, of which alone she had a right to dispose." And he therefore held that the devisees took no beneficial interest. The devise in such case is not extended by the Wills Act 1 Viet. c. 26, s. 23. *Ib.* See *post*, Part IV. Chap. II. 'Wills.'

(d) *Weeding v. Weeding*, 1 J. & H. 424; 30 L. J. C. 680.

(e) See *Watts v. Watts*, L. R. 17 Eq. 217; 43 L. J. C. 77.

conveying the legal estate only, unless the intention to pass the purchase money by it appear in the will (a).

A statutory notice by a company to take lands under their compulsory powers of purchase has not alone the effect of a contract of sale by way of equitable conversion (b); but when followed by a contract settling the price and terms of sale, the conversion in equity is complete from the date appointed for the completion of the sale (c).

Conversion by compulsory sale.

The contract operates on the part of the purchaser as a conversion of his personal estate to the amount of the purchase money into the land, according to the terms of the contract; and if he die before completion his heir or devisee becomes entitled to have the purchase completed as against the personal representative and the purchase money paid out of the personal estate (d).

Conversion of the purchase money into the land.

The conversion in favour of the heir or devisee depends upon whether the contract is such as a court of equity would specifically enforce against the purchaser (e).

Depends upon the liability of the purchaser to specific performance.

(a) *Wall v. Bright*, 1 J. & W. 494; *Knollys v. Shepherd*, ib. 499; *Drant v. Vause*, 1 Y. & C. C. 580; *Emuss v. Smith*, 2 D. & S. 722; see *Hawkins on Wills*, 38; and see *Lowry's Will*, L. R. 15 Eq. 78; 42 L. J. C. 509.

(b) *Haynes v. Haynes*, 1 Dr. & Sm. 426; 30 L. J. C. 578.

(c) *Ex p. Hawkins*, 13 Sim. 569; *re Manchester v. Southport Ry. Co.*, 19 Beav. 365; *re Lowry's Will*, supra; *Watts v. Watts*, L. R. 17 Eq. 217; 43 L. J. C. 77, in such case the sale is enforced and the conversion effected under the compulsory powers, and not under the jurisdiction of the court over the specific performance of contracts; and therefore it is not necessary that there should be a contract evidenced according to the requirements of the Statute of Frauds.

(d) See *per Eldon*, L. C., 7 Ves.

274, in *Seton v. Slade*; and 10 Ves. 614, in *Broome v. Monck*. As to when a devise of land includes land contracted to be purchased, see *Hawkins on Wills*, 38.

(e) "As between the heir and the personal representatives, *Lacon v. Mertins*, 3 Atk. 1, *Buckmaster v. Harrop*, 7 Ves. 341, and other cases, established the general principle, that whatever is the state of liability of the party himself to take at his death must be the state of liability to be considered upon questions between those representing him after his death." *Per Eldon*, L. C., 10 Ves. 607, in *Broome v. Monck*; *Garnett v. Acton*, 28 Beav. 333.—Although the purchaser might have waived objections, as to title or otherwise, the court cannot speculate upon what he would or would not have done; "but the inquiry must be, whether at his death a contract existed by which he was

Where purchaser liable for specific performance.

If the purchaser was liable for specific performance of the contract at his death, his heir or devisee becomes entitled to the benefit of it; and this right is not affected by the vendor becoming discharged by subsequent circumstances, as by an unreasonable delay on the part of the purchaser's representatives caused by the state of his affairs;—or by the vendor electing to rescind the contract under the conditions of sale instead of complying with certain requirements as to the title;—in such cases the heir retains the right of having the purchase money raised for his benefit out of the personal estate, subject to the modification introduced by the statute 30 & 31 Vict. c. 69, hereafter mentioned (*a*).

Where purchaser not liable for specific performance.

If the contract be such that the purchaser could not be compelled to specific performance, there is no conversion of the purchase money in favour of heir or devisee, and he acquires no right against the personal estate, either to have the contract completed or to be paid the amount of purchase money: as where the contract, as against the purchaser, did not satisfy the requirements of the Statute of Frauds (*b*);—or where the vendor could not make a good title (*c*);—so, if the purchaser has an option to complete, which he has not exercised before his death, his real representative takes nothing (*d*).

Purchase money charged primarily upon land purchased by a testator.

By the statute 30 & 31 Vict. c. 69, (explaining Locke King's Act, 17 & 18 Vict. c. 113,) the latter Act is extended "to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator." And by Locke King's Act, the land or hereditaments so charged are made as between the different persons claim-

bound, and which he could be compelled to perform; "per Grant, M. R., 7 Ves. 344, in *Buckmaster v. Harrop*.

(*a*) *Whittaker v. Whittaker*, 4 Bro. C. C. 30; *Hudson v. Cooke*, L. R. 13 Eq. 417; 41 L. J. C. 306.

(*b*) *Buckmaster v. Harrop*, 7 Ves. 341.

(*c*) *Broome v. Monck*, 10 Ves. 597.

(*d*) *Earl Radnor v. Shafto*, 11 Ves. 448.

ing through or under the testator primarily liable to the payment, and the heir or devisee is disentitled to having the debt discharged or satisfied out of the personal estate, unless the testator shall have signified a contrary or other intention.—The above enactment mentions the case of a testator only, and is not extended to the estate of a person dying intestate (a).

(a) *Hudson v. Cooke*, 41 L. J. C. 306 ; L. R. 13 Eq. 417 ; *Harding v. Harding*, 41 L. J. C. 523 ; L. R. 13 Eq. 493.

CHAPTER II.

THE LIMITATION OF FUTURE ESTATES.

- Section I. The limitation of future estates at common law.
- II. Future Uses.
- III. Future Devises.
- IV. Powers.
- V. The Rules against Perpetuities and Accumulations.
- VI. Future Equitable Estates and Interests.

The present chapter treats of the limitation of estates in regard to the time of commencement, that is to say, as commencing at a future time, whether as regards the coming into possession or the vesting in interest (*a*).

The limitations of future estates may be distinguished primarily according to the sources of the law to which they are to be referred :—at the common law, by way of *reversion* and *remainder* ;—under the Statute of Uses, admitting, besides the future limitations of the common law, *springing* or *shifting uses* ;—and in wills, admitting *executory devises* ;—these form respectively the subjects of the first three sections of this chapter.

Powers may also be distinguished as a special mode in which future estates, whether by way of use or under wills, may be limited and created ; they are treated separately in the fourth section.

The Rule against perpetuities by which the limitation of future estates is restricted forms the subject of the fifth section ; together with the law restricting the accumulation of rents and profits.

(*a*) See *ante*, pp. 9, 152.

There will then remain to be treated in the sixth and last section the doctrines of equity by which *future equitable estates* and interests, whether created by express declaration or constructive trusts, are regulated and ranked in order of priority.

SECTION I. THE LIMITATION OF FUTURE ESTATES AT COMMON LAW.

- § 1. Reversions.
- § 2. Remainders.
- § 3. Contingent remainders.
- § 4. Rule in Shelley's case.

§ 1. REVERSIONS.

Rule that freehold cannot be limited *in futuro*—reversion and remainders of freehold.

Reversion in fee upon creation of particular estate—limitation of reversion to the grantor or his heirs void at common law—creates title by purchase under statute 3 & 4 Will. IV. c. 106.

Reversion in particular estate upon creation of less estate—in estate tail—in estate for life—in term of years upon underlease.

Tenure of particular estate to reversion.

It was a principle of the common law that the seisin or freehold could never be put in abeyance; that there must always be a present tenant to answer to the requirements of tenure. Whence the rule that an estate of freehold cannot be limited to commence at a future time (a). Estate of freehold cannot be limited to commence *in futuro*.

But the freehold may be distributed into a particular estate and reversion or remainders; and the reversion or remainders, though vested in interest, are deferred or future estates in regard to the possession. Moreover, a remainder may be limited upon a contingency so as to Reversion and remainder of freehold.
Contingent remainder.

(a) See *ante*, p. 47.

defer also the vesting until the determination of the particular estate, consistently with the rule that the freehold shall not be in abeyance, as the tenancy is full during the continuance of the particular estate (*a*). Reversions and Remainders, vested and contingent, as the future estates admissible at common law, form the subject of this section, and as supplementary to the treatment of remainders, the doctrines of limitation embodied in and connected with the rule in *Shelley's* case, have to be considered. Accordingly, these matters form the subjects of the several subsections.

Lease may be made for term of years to commence *in futuro*.

It may here be observed that leases and limitations of terms of years, which deal with the possession only and not with the freehold interest, may be made to commence in possession at a future time, giving merely an *interesse termini* or right to have the possession when the time arrives, but no estate in the land (*b*).

Future uses of copyholds.

Also, the limitations of estates of copyhold or customary tenure are independent of the freehold; for the freehold remains vested in the lord. Hence under that tenure future estates, though freehold as to quantity, may be limited to arise independently of any preceding estate; and if a surrender be made to such future uses, the lord is bound to admit the surrenderee when the use becomes vested in interest (*c*).

Reversion in fee upon creation of particular estate.

If tenant in fee simple convey the land to a person for a particular estate only, as for an estate tail, or for term of life, or of years, there remains in him and his heirs an estate expectant, as to the possession, upon the determination of the particular estate. This estate is called *the reversion*, because the land then reverts or returns in possession to him or to his heirs (*d*).

An express limitation of the reversion to the grantor

(*a*) See *ante*, p. 48.

(*b*) Co. Lit. 45 *b*; see *ante*, pp. 50, 199; *Doe v. Walker*, 5 B. & C. 111.

(*c*) See *ante*, p. 82.

(*d*) Co. Lit. 22 *b*; 142 *b*; 183 *b*; Plowden, 196; see *ante*, p. 40.

or to his heirs was void of effect at common law; for it merely stated the legal result of the creation of the particular estate out of his original estate, leaving the residue or reversion in him by the same title as before (a). Express limitation of reversion.

But by the statute 3 & 4 Will. IV. c. 106, (the Inheritance Act,) s. 3, under a limitation by any assurance (executed after 31st December, 1833,) to the person or to the heirs of the person who shall thereby have conveyed the same land, "such person shall be considered to have acquired the land as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof." Makes the grantor a purchaser by statute.

By the effect of the statute the grantor "takes, under his own assurance, as if the estate were to him and his heirs of the gift of a stranger; and where he creates a particular estate, limiting the expectant fee to himself and his heirs, or, without naming himself as an object, to his heirs, he takes the fee, *for the purposes of descent at least*, not as a reversioner, but as a remainderman. But where, on a conveyance at the common law creating particular estates only, the fee tacitly remains in the grantor, his former estate is preserved (b)."—It may be observed that if the effect of the statute were to convert the reversion into a remainder by force of the limitation for all purposes, the tenure of the particular estate to the reversioner would be destroyed, and the incidents of the reversion, such as rent and services, would be lost (c).

In like manner, if the tenant of a particular estate convey the land for a less estate, he has a reversion left in himself;—thus tenant in tail, by a disentailing assurance, may dispose of the lands entailed in fee simple or for any less estate; and if he make a disposition for a less estate, the reversion remains in him and is subject Reversion in particular estate.
Estate tail.

(a) See *ante*, p. 52; Co. Lit. 22 and see *post*, Part IV. Chap. III.
b; *Bingham's Case*, 2 Co. 91 a. 'Descent.'

(b) 1 Hayes Convey. 317, 5th ed.; (c) See *ante*, p. 42.

to the entail, unless it be wholly barred by the same assurance (*a*). If tenant in tail lease for life or for years at common law, without a disentailing assurance or any other special or statutory power in that behalf, he has a reversion ; but such lease is valid only during his life and is voidable at his death by the heir in tail (*b*).

Estate for life.

So, tenant for life may make a lease for years, and, however long the term of years may be, as it is not coextensive with the freehold, there is a reversion in the lessor (*c*). But such lease, unless made under a special or statutory power, is valid only during the continuance of the lessor's estate, and is avoided by his death.

Reversion in term of years upon underlease.

If tenant for term of years make an underlease for a shorter term, by however small an interval of time, he has the reversion for that interval left in him (*d*). An underlease for a shorter term, "if the underlessee shall so long live," leaves a reversion expectant on the determination of the sub-term either by lapse of time or by the death of the underlessee (*e*).—An underlease for the whole term, or for a greater term, operates as an assignment and leaves no reversion ; it carries with it all the rights and liabilities incident to the term and leaves none of the incidents of a reversion (*f*). If tenant for term of years convey the land to another for an estate for life or in tail at common law, the whole term passes and there is no reversion (*g*).

(*a*) 3 & 4 Will. IV. c. 74, ss. 15, 21 ; see *ante*, p. 40.

(*b*) Co. Lit. 45 *b*, 46 *b* ; Lit. s. 606 ; see *ante*, p. 191 ; and see *post*, Part IV. Chap. I. 'Disposition by Tenant in tail.'

(*c*) "In the eye of the law any estate for life, being an estate of freehold, is an higher and greater estate than a lease for years, though it be for a thousand or more." Co. Lit. 46 *a* ; *Earl Derby v. Taylor*, 1 East, 502 ; and see *post*, Part IV. Chap. I. 'Disposition by Tenant for life.'

(*d*) See *Holford v. Hatch*, Dougl.

183 ; *Parmenter v. Webber*, 8 Taunt. 593 ; *Baker v. Gostling*, 1 Bing. N. C. 19.

(*e*) See *ante* p. 220 ; *Wright v. Cartwright*, 1 Burr. 282.

(*f*) *Hicks v. Downing*, 1 L. Raym. 99 ; 2 Salk. 10 ; *Wollaston v. Hakewill*, 3 M. & G. 297 ; *Beaumont v. Marquis of Salisbury*, 19 Beav. 198 ; 24 L. J. C. 94 ; *Beardman v. Wilson*, L. R. 4 C. P. 57 ; 38 L. J. C. P. 91.

(*g*) Plowden, 520 ; 1 Burr. 284, *Wright v. Cartwright* ; see *Butt's Case*, 7 Co. 23 *a* ; *Fearne*, C. R. 461 ; Wms. Ex. 565 (*d*) ; *post* p. 320.

The grant of a particular estate, leaving a reversion in the grantor, creates a tenure between the tenant of the particular estate and the reversioner. This tenure is not within the statute of *Quia emptores*, for that statute extends only to alienations in fee simple, preventing any new tenure arising upon such alienations. Hence rent reserved upon such a grant of a particular estate is of the nature of rent service, and is attended at common law with the remedy of distress (*a*). And a grant of the reversion impliedly carries with it all the incidents of the tenure, as the rent service, if any, unless there be an express exception of such incidents in the grant (*b*).

Tenure of particular estate to reversion.

Rent service.

Grant of reversion carries the incidents of tenure.

§ 2. REMAINDERS.

Remainder—must follow immediately on the particular estate—must wait the determination of the particular estate—must be created at same time with the particular estate.

Remainder cannot be limited after fee simple—remainder after fee tail—after base fee—after lease for years.

Remainders in particular estates—terms of years.

Tenure of particular estate and remainder.

If tenant in fee simple convey a particular estate in the land to one person, and at the same time another estate, to commence in possession immediately upon the expiration of the particular estate, to another person, the latter estate is called, relatively to the prior particular estate, a remainder (*c*).

Remainder.

Thus, if tenant in fee simple grant to A. for life, and after the determination of that estate to B. for life, the estate of B. is a remainder relatively to the estate of A. So, if the grant be made to A. for life, and after the

Examples.

(*a*) Lit. ss. 19, 214, 215, 216; Co. Lit. 23 *a*, 143 *a*, 151 *b*; and see *ante*, p. 42.

(*b*) Lit. ss. 228, 229, 572; Co. Lit. 143 *a*.

(*c*) Co. Lit. 49 *a*, 143 *a*; *ante*, p. 41.

Successive remainders.

determination of that estate to B. and to his heirs, B. has a remainder in fee. In the former example there is a reversion in fee in the grantor; in the latter the whole fee is disposed of and there is no reversion.—In like manner, several remainders may be created successively in the same land, either leaving a reversion or with an ultimate remainder in fee.

Remainder must follow immediately on particular estate.

If a grant be made to A. for life, and after the lapse of a day after his death to B. for life or in fee, the limitation to B. is not a remainder, because it does not commence in possession immediately on the determination of the particular estate; it is a limitation of a freehold estate to commence *in futuro*, which in a common law conveyance is void, and the reversion of A.'s estate remains in the grantor (a).

Remainder must wait the determination of particular estate.

Also a limitation which is to take effect in defeasance of a preceding estate, without waiting for the regular determination of that estate according to the terms of its limitation, is not a remainder; and such a limitation is void at common law (b). But the preceding particular estate may be made determinable by a conditional limitation, and the estate limited to take effect in possession immediately upon its determination, whether that happen under the conditional limitation or by the expiration of the full term of limitation, is a remainder (c).

Remainder must be created at same time with particular estate.

The particular estate and the remainder must be created at the same time by one conveyance or instrument; for if the particular estate be first created, leaving the reversion in the grantor, any subsequent disposition can be effected

(a) *Ante*, p. 46; Plowden, 25 b; Fearn, C. R. 307, 398, as to such limitations of uses and in wills, see *post*, pp. 355, 363.

(b) Fearn, C. R. 14, 261, 274; Plowden, 24; though it may be effectually made by way of shifting use or executory devise, see *post* pp. 350, 361. At common law the seisin or possession of the freehold could not be made to pass over from one to another without livery, except by

way of remainder which was supported by the livery made of the particular estate, *ante* p. 46; and though a freehold estate might be made voidable upon a condition by entry, yet the right of entry could be reserved only to the grantor and his heirs, and not to a stranger; nor was it transferrable. *Ante*, p. 223.

(c) See *ante*, p. 217.

only by grant or assignment of the reversion; which is not thereby changed into a remainder, but still retains its character of a reversion, to which the tenure of the particular estate is incident (a).

No remainder can be limited in expectancy upon an estate in fee simple, that being the largest estate allowed by law; nor is any reversion left in the grantor after the grant of such an estate. Upon the death of a tenant in fee simple, without having devised his estate by will, and without leaving heirs, the land passes by *escheat* to the next superior lord (b).

An estate in fee tail, being a particular estate since the statute *De donis*, admits of limitations in remainder expectant upon its determination (c).—An estate tail at common law was a fee simple conditional, and did not admit of any remainder or reversion expectant upon it; and such is the case still with limitations in tail of inheritances not within the statute *De donis*, as with copyholds in manors in which there is no custom of entail (d).

If tenant in tail alienate the land by an assurance which is effectual as against the issue in tail, but is not effectual to bar the estates in reversion or remainder, (which was formerly the case with a fine, and may still be the case with a disentailing assurance under the Fines and Recoveries Act, 3 & 4 Will. IV. c. 74,) a *base fee* is created determinable by the failure of the issue in tail of the original tenant; when the reversion or remainder, unless barred by subsequent proceedings, takes effect in possession. A base fee may thus co-exist with a reversion or remainder by matter *ex post facto*, though it cannot be so limited by original grant (e).

(a) See *Fearne*, C. R. 302; *Plowden*, 25; *ante* p. 43.

(b) See *ante*, p. 41; *Tilburgh v. Barbut*, 1 Ves. sen. 89; *Ware v. Cann*, 10 B. & C. 433.

(c) See *ante*, p. 41.

(d) See *ante* p. 81. *Earl Stafford*

v. Buckley, 2 Ves. sen. 170; *Doe v. Simpson*, 3 M. & G. 929;

(e) See *ante*, p. 40; Co. Lit. 18 a. A like result may be produced by a power in a settlement which may be operative over an estate tail, but extinguished as to the re-

Remainder after
term of years.

If a lease for years be made in possession, and at the same time the freehold be limited, the limitation of the freehold is subject to the term of years, but is not a remainder strictly so called; for the lease for years does not interfere with or affect the limitation of the freehold title. The limitation of the freehold takes immediate effect, as regards the seisin or legal possession, though it is commonly described as in remainder, as regards the *de facto* possession, which is deferred until the expiration of the term of years (*a*). Hence a limitation subject to a term of years, as it deals with the immediate freehold, cannot be made upon a contingency, but must give a vested estate (*b*).

Remainders in
particular
estates.

Tenant of a particular estate of freehold may, in general, convey the land for a less estate with remainder over (*c*).

Term of years
does not admit
of remainder.

A term of years, being personal estate, does not admit of limitation, at common law, into a particular estate and remainder (*d*).—If tenant for term of years assign the term to a person for life, it operates as an absolute assignment of the whole term; however long the term may be (*e*).—Tenant for term of years may make an underlease for a less number of years, thereby creating a new term in the underlessee with the reversion of the original term in himself; and he may make a further underlease to another person commencing at the expiration of the prior one (*f*). Where a lease was made to A. for ninety-nine years, if he should so long live, and if he should die within the term, the remainder thereof to B. for the resi-

Underlease of
term.

mainders. See *Jones v Winwood*, 3 M. & W. 653; 10 Sim. 150; 1 Sanders on Uses, 171, 4th ed. See as to barring the remainders, 37 & 38 Vict. c. 57, s. 6.

(*a*) See *ante*, pp. 44, 49.

(*b*) See *ante*, p. 49; *post*, p. 326.

(*c*) See *ante*, 'Reversion,' p. 315; *Low v. Burron*, 3 P. Wms.

262; *Fearne*, C. R. 495, and see *post*, Part IV. Chap. I. 'Disposition by Tenant for Life.'

(*d*) See *ante*, p. 7; *Hargrave's* note (5) to *Co. Lit.* 20 *a*; *Fearne*, C. R. by *Butler*, 402, 567.

(*e*) *Co. Lit.* 46 *a*; *Plowden*, 520; *ante*, p. 316.

(*f*) See *ante*, p. 316.

due of the term, it was construed as a lease to B. for so many of ninety-nine years as should be unexpired at the death of A. ; the word *term* being construed, for the purpose of supporting the limitation, to mean the time or number of years mentioned (a).

By means of an executory bequest in a will a term may be bequeathed to a person, with a bequest over to another, to take effect upon the death of the former or other specified event ; the effect of which is to divest the term primarily vested in the first legatee (b).—Also, by vesting the term in a trustee, the trust or equitable estate may be disposed of with the same freedom and according to the same rules of limitation as executory bequests in wills (c).

Executory bequest of term.

Future trusts of term.

Upon the grant of a particular estate with remainder or remainders, leaving a reversion in the grantor, the relation of tenure is created between the successive tenants of the particular estate and remainders and the reversioner. But if the ultimate remainder is granted in fee leaving no reversion, no new tenure is created, and the tenants in succession hold of the chief lord by the statute of *Quia emptores* (d). There is no tenure between the tenant of the particular estate and the remainderman ; for the one does not derive title from the other, but both from the same source.

Tenure of particular estate and remainder.

(a) *Wright v. Cartwright*, 1 Burr. 282.

(b) "The old cases held 'that there could be no remainder or substitution of a term after an estate for life by deed or will.'—There was no particular estate. The gift of a term (like any other chattel) for an hour, was good for ever.—Such limitations were soon allowed to be created by will : and the old objections were removed by changing the name from remainders to *executory devises* ;" per Lord Mansfield, C. J., 1 Burr. 284,

in *Wright v. Cartwright*.—"No remainders can be limited in real and personal chattels ; every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory." 1 Jarman on Wills, 793. As to executory devises, see *post*, p. 360.

(c) Hargrave's note (5) to Co. Lit. 20 a ; Fearn, C. R. 470 ; *Mas-singberd v. Ash*, 1 Vern. 234, 304.

(d) See *ante*, p. 42 ; Lit. s. 215, 216 ; 2 Inst. 505.

§ 3. CONTINGENT REMAINDERS.

Vested remainder—contingent remainder—distinction of contingency as to the person and as to the interest—examples.

Contingent remainder must be supported by a particular estate of freehold.

Contingent remainder must vest before or at the determination of the particular estate—exception as to posthumous child.

Contingent remainder takes effect notwithstanding the forfeiture or merger of the particular estate—effect of forfeiture or merger—trustees to preserve contingent remainders.

Contingent remainder of copyholds.

Remainder to unborn child—remainder to child of unborn child—strict settlement—*Cy pres* doctrine of construction of wills.

Contingent remainder for life or in tail with vested remainder—alternative contingent remainders in fee—contingent remainder in fee with vested remainder.

Construction of remainders as vested or contingent—words of contingency referred to possession rather than vesting—remainder construed to vest as soon as possible—remainder to class, as children—remainder to children who shall attain twenty-one.

A remainder which is certain as to the owner and absolute as to his estate or interest is a *vested* remainder; the remainderman is presently *invested* with a portion of the seisin or freehold, the whole fee being divided into a particular estate and remainder or remainders (a).

Contingent remainder.

But a remainder may be limited to a person not yet ascertained, or to a certain person upon a condition precedent which may not happen until after the determination of the particular estate; and whilst such uncertainty lasts, as to the person or the interest, it is described as a *contingent* remainder.—A contingent remainder becomes changed into a vested remainder by the owner becoming certain or the condition happening during the continuance of the particular estate (b).

(a) See *ante*, pp. 45, 48.

(b) See *ante*, pp. 48, 214.

According to Fearne,—“A contingent remainder is a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate” (a).—And, as he afterwards explains,—“It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable; as the remainderman may die or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent (b).

Fearne distinguishes four sorts of contingent remainders which may be shortly exhibited in the following scheme:—Remainders limited, 1. Upon an uncertain event, which also determines the particular estate by conditional limitation;—2. Upon an uncertain event, which does not affect the particular estate;—3. Upon a certain event which may not happen until after the determination of the particular estate;—4. To a person not ascertained or not in being (c).

Classification of
contingent re-
mainders.

But “all contingent remainders appear to be so far reducible under one head, that they depend for their vesting on the happening of an event, which, by possibility, may not happen during the continuance of the preceding estate, or at the instant of its determination” (d).

Reducible under
one head.

A distinction, however, is to be observed between the uncertainty as to the person in the last sort; and the

(a) Fearne, C. R. 3.

(c) Fearne, C. R. 5.

(b) Fearne, C. R. 216; per Willes C. J., 3 Atk. 138, *Smith v. Packhurst*; per Eldon C. J., 2 B & P. 296, *Doe v. Scudamore*.

(d) Butler's note (g) to Fearne, C. R. 9; and see Hayes Conv. App. VI. 3, p. 553, 5th ed.

Distinction between contingency of ownership and of interest.

uncertainty of some event not concerning the person in the first three of the above sorts, which is of practical importance; for remainders of the former kind, which are limited in contingency as to the person are, by the nature of the limitation, inalienable, and, therefore, tend to a perpetuity (*a*).

Examples.

To A. for life, remainder to son of A.

The various forms of contingent remainders may be conveniently explained or illustrated by some examples:

To A. for life, remainder to children living at his decease.

—If land be limited (as is common in settlements) to A. for life, with remainder to the first and every other son of A. successively in tail, A. as yet having no son, the remainder is contingent until a son be born to A. in whom the remainder may vest.—So if it be limited to A. for life, with remainder to such children as he shall leave at his decease, the remainder is contingent during the life of A. (*b*.)

To A. for life, remainder to heir of B.

If land be limited to A. for life, with remainder to the heirs of B., the remainder is contingent during the joint lives of B. and A.; for there can be no heir of B. until his death, which may not happen during the life of A (*c*). —If the ancestor take an estate of freehold by the same conveyance, the limitation to his heirs is not a contingent remainder to the heir, but is referred to the estate of the ancestor by the rule in *Shelley's* case, to be considered hereafter (*d*).—In the above examples the remainder is limited to a person or persons not ascertained.

(*a*) See *post*, p. 333. The distinction was pointed out by Willes C. J., in *Smith v. Packhurst*, 3 Atk. 139:—"That all contingent remainders may be reduced to two heads; *first*, where a remainder is limited to a person not in being, and who may possibly never exist; and *secondly*, where a remainder depends upon a contingency collateral to the continuance of the particular estate." The second head, is, perhaps, not quite accurately expressed, as the particular estate may be de-

terminable upon the same contingency as in *Fearne's* first sort.

(*b*) See *Doe v. Hopkinson*, 5 Q. B. 223, 230; and see *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191.

(*c*) Co. Lit. 378 *a*; *Archer's Case*, Co. 66 *b*; 3 Co. 20 *a*, *Boraston's Case*; *Challoner v. Bowyer*, 2 Leon. 70; Perkins, s. 52; see *Doe v. Briggs*, 16 East, 406, 413. As to the construction of limitations to heirs, see *ante*, pp. 158, 161.

(*d*) See *ante*, p. 157; *post*, p. 342.

If land be limited to A. for life, with remainder, if B. survive A., to B. in fee, the remainder is made contingent upon the death of A., B. surviving, upon which event the remainder vests in interest and takes effect in possession at the same time (a).—A limitation to A. for life, with remainder, if B. survive A., to B. *for life*, gives a vested remainder, for the terms of contingency merely express the uncertainty of B.'s interest taking effect in possession (b).—If land be limited to A. for life, with remainder upon the death of B. to C, the remainder is contingent upon B. dying in the lifetime of A (c).—So to A. for life and after his death to the children of B., if he leave any him surviving (d).

To A. for life,
remainder if
B. survive A., to
B.

To A. for life,
remainder after
death of B. to C.

If land be limited to A. for life with remainder, if he die without leaving issue at his death, to B., the remainder is contingent upon that event.—In the case of a devise to A. for life, and upon failure of issue of A. indefinitely, to B., A. would take an estate tail by implication and B. a vested remainder expectant upon the estate tail (e).

To A. for life,
remainder if A.
die without leav-
ing issue.

So, if land be limited to A. in tail and if A. die without leaving issue at his death to B., the limitation to B. is a remainder contingent upon the death of A. without leaving issue, an event which at the same time determines the particular estate (f). A like limitation over after a limitation to A. in fee would operate to divest the fee and would not be a remainder; it would be void at common

To A. in tail, re-
mainder if A.
die without leav-
ing issue.

(a) *Doe v. Scudamore*, 2 B. & P. 289.

(b) See *ante*, p. 323; *Bolton v. Bolton*, L. R. 5 Ex. 145; 39 L. J. Ex. 89.

(c) 3 Co. 20 a, *Boraston's Case*; Pollex. 54, *Weale v. Lower*.

(d) *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191.

(e) See *ante*, p. 182. The restricted construction of failure of issue at death is now put upon all ambiguous phrases in wills, such as "dying without issue," "dying

without leaving issue," and the like, by the statute 1 Vict. c. 26, applying to wills since 1837; but it may be observed that under this construction, if A. leave issue, though the contingent remainder of B. fails, the issue take nothing, because the estate of A. is not extended to an estate tail. 1 Jarman on Wills, 490, 497.

(f) Butler's note to *Fearne*, C. R. 7; see *Doe v. Elvey*, 4 East, 313.

law, but might be good as a shifting use or as an executory devise (*a*).—So if land be limited to A. in tail *male*, and if he die without issue to B., the remainder to B. is contingent upon the failure of issue general concurring with the failure of issue male, whereby the particular estate is determined (*b*). So if land be limited to A. in tail, and if he die under twenty-one and without issue to B., the remainder is contingent upon the determination of the estate tail by death without issue under twenty-one, and if A. attain that age, though he die without issue it fails (*c*).

Contingent remainder must have a particular estate of freehold.

The principle of the common law that the seisin of the freehold can never be in abeyance, but must always be vested in some determinate person imposes two rules upon the limitation and operation of contingent remainders:—The first of which rules is that a contingent remainder of freehold must always have a particular vested estate of freehold to support it (*d*).

Limitation of term of years with remainder of freehold.

A lease for a term of years does not interfere with the limitation or vesting at the same time of the freehold estate, subject to the term, as it deals only with the *de facto* possession. Therefore, if land be limited to A. for a term of years, with remainder to B. for life or in fee, the limitation to B. is a remainder only in regard to the *de facto* possession; but as regards the seisin of the freehold it is an immediately vested estate (*e*). And if the remainder to B. were limited upon a contingency, as if he should survive A., the limitation would purport to dispose of the freehold *in futuro* leaving it in abeyance until the contingency occurred; it would, therefore, be void at common law, and the next limitation of the freehold

(*a*) See *post*, pp. 352, 361.

(*b*) *Cole v. Sewell*, 4 Dr. & W. 1; 2 H. L. C. 186.

(*c*) *Grey v. Pearson*, 6 H. L. C. 61; 26 L. J. C. 473; dissenting from *Brownson v. Edwards*, 2

Ves. sen. 243, where in like limitations "and" was read "or." See *post*, p. 361.

(*d*) *Fearne*, C. R. c. iii. p. 281; see *ante*, p. 50.

(*e*) See *ante*, pp. 44, 49, 320.

(if any), or the reversion of the lessor would take immediate effect (a).

So also, if land be limited to A. for years with remainder to the heirs of A., the limitation to the heirs of A. is void, as of a freehold *in futuro* (b).—But if limitations be made to A. for years, with remainder to B. for life or in tail, with remainder to the heirs of A., there is a vested freehold in B. which will support the contingent remainder. So a limitation to A. for years, with remainder to B. during the life of A., with remainder to the heirs of A., would be a good limitation of the ultimate remainder, there being a vested freehold in B. to support it during the period of contingency (c).

If land be limited to A. for twenty-one years, if he shall so long live, with remainder, after the death of A., to B., such remainder is contingent, because the death of A. may not happen until after the expiration of the particular estate; it is therefore void for want of a preceding freehold to support it (d).—If the remainder in such case were limited “after the determination of the term” instead of after the death of A.; so as to take effect whether the term determined by lapse of time or by the death of A., it would be good as a vested estate.—And in some cases of a limitation to A. for a term of years, if he should so long live, with remainder over after the death of A., where the term of years was so great as to render the chance of A. outliving the term inconsiderable, the remainder has been construed, in favour of the intention, as if limited after the determination of the term, and has been held good as limiting a vested estate. This construction is reached either by rejecting the words “after the death of A.” as repugnant, or by applying the

To A. for years with remainder to heirs of A.

To A. for years, if he shall so long live, remainder after death of A. to B.

Construction where term of years is greater than probable life of A.

(a) See *ante* p. 49.

(b) Co. Lit. 217 a; 3 Co. 20 a, *Boraston's Case*; *Goodright v. Cornish*, 1 Salk. 226.

(c) See *Egerton v. Brownlow*, 23 L. J. C. 348; 4 H. L. C. 1.

(d) *Fearne*, C. R. 8; 3 Co. 20 a, *Boraston's Case*.

additional words "or other sooner determination of the term" (a).

Contingent remainder must vest before or at the determination of the particular estate.

The other rule resulting from the principle above stated is,—That a contingent remainder must become vested during the continuance of the particular estate or at the instant of its determination. If not then vested, it fails altogether, and the next limitation takes immediate effect (b).

Examples.

For example, if land be limited to A. for life or in tail with remainder to the heir of B., and A. die or die without issue before B., there is no person then ascertained as heir of B. to take the remainder and it becomes void of effect (c).—Where land was devised to A. for life, and after his death to the children of B., if he left any him surviving, and A. died in the lifetime of B., the contingent remainder to B.'s children failed (d).—So if land be limited to A. for life, remainder to B. for years, remainder to the heir of B., the contingent remainder to the heir is defeated by the death of A., and consequent determination of the particular estate of freehold, before the death of B. and ascertainment of the heir (e).

It is sufficient that the remainder become vested at the instant of the determination of the particular estate (f).—Thus if land be limited to A. during the life of B. with remainder to the right heirs of B., the death of B. determines the particular estate and at the same time vests the remainder by ascertaining the heir (g).—So, if land be limited to A. and B. for their joint lives with re-

(a) *Fearne*, C. R. 21; *Napper v. Sanders*, Hut. 119; see *Henning v. Brabazon*, 2 Lev. 45; *Beverley v. Beverley*, 2 Vern. 131; *Goodtitle v. Burtenshaw*, *Fearne*, C. R. App. I; Sugden's note to Gilbert on Uses, p. 170.

(b) *Fearne*, C. R., ch. iv. p. 307

(c) *Co. Lit.* 378 a; *Jenkins*,

248; *Doe v. Morgan*, 3 T. R. 763.

(d) *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191.

(e) *Doe v. Morgan*, supra; and see *Hole v. Escott*, 2 Keen, 444; 4 M. & Cr. 187, the marginal note in the latter report does not state the limitations correctly.

(f) *Fearne*, C. R. 310.

(g) *Co. Lit.* 298 a.

mainder to the survivor (*a*).—Or if land be limited to A. and B. during their joint lives, with remainder to the heirs of him who shall die first (*b*).—So to A. in tail, and if he die without issue leaving at his death, to B (*c*).

An exception to the rule occurs in favour of posthumous children. It is enacted by the statute 10 & 11 Will. III. c. 16, that where any estate is settled in remainder to children, any posthumous child may take in the same manner as if born in the lifetime of the father.

Exception as to
posthumous
children.

This statute is declaratory of the law, for it is a general rule that a child *in ventre sa mère*, who is afterwards born, is to be considered as in existence for its benefit, as for the purpose of inheriting, or of taking by purchase or by devise under the description of a child or even of a child “born;” and so also for the purpose of preventing a gift over dependent upon its non-existence from operating to deprive it of property (*d*).

But a posthumous child taking a remainder under the statute becomes entitled to the intermediate rents and profits of the lands settled from the determination of the particular estate (*e*). A child *in ventre sa mère* becoming entitled by descent or by devise in defeasance of the estate of an heir or residuary devisee is not entitled to the intermediate rents accrued due before the birth (*f*).

By the statute 8 & 9 Vict. c. 106, s. 8, it was enacted that “a contingent remainder existing at any time after the 31st December, 1844, shall be capable of taking

Contingent remainder may take effect notwithstanding determination of particular estate by forfeiture, etc.

(*a*) Fearn, C. R. 9; *Doe v. Tomkinson*, 2 M. & S. 165.

(*b*) Co. Lit. 378 *b*.

(*c*) See *ante*, p. 325.

(*d*) Butler's note (3) to Co. Lit. 298 *a*; *Blackburn v. Stables*, 2 V. & B. 369; *Pearce v. Carrington*, L. R. 8 Ch. 969; 42 L. J. C. 900; “*Fictione juris pro jam natis ha-*

bentur quoties de ipsorum commodo agitur,” see *per* Westbury, L. C., in *Blasson v. Blasson*, 2 D. J. & S. 665; 34 L. J. C. 18.

(*e*) *Basset v. Basset*, 3 Atk. 203.

(*f*) *Richards v. Richards*, Johns. 754; 29 L. J. C. 836; *re Mowlem*, 43 L. J. C. 353; L. R. 18 Eq. 9.

effect notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened."

Contingent remainder destroyed by forfeiture, surrender, or merger of the particular estate.

Before this enactment contingent remainders were liable to fail by the determination, by forfeiture, surrender, or merger, of the preceding particular estate of freehold before it had reached its prescribed term of limitation; and these means might be employed for the purpose of defeating and destroying contingent remainders.

A tenant for life might effect a forfeiture at common law, to the extinguishment of his own estate and the consequent destruction of contingent remainders expectant upon it, by making a feoffment in fee (*a*); also by levying a fine or suffering a recovery (*b*).

A tenant for life might also destroy the contingent remainders expectant upon his estate by surrendering his estate to the next vested estate in remainder (*c*); or by acquiring to himself by purchase the next vested estate in remainder (*d*); by which means his estate which supported the remainders would become merged and extinguished. And a merger might also be effected, and the contingent remainders destroyed by the union of the particular estate and the next vested remainder by conveyance to a third person (*e*).

But contingent remainders were not destroyed by merger, where the inheritance became united to a devisee of the particular estate by descent from the testator (*f*); nor where the particular estate and the in-

(*a*) See *ante*, p. 57.

(*b*) *Doe v. Howell*, 10 B. & C. 191; *Doe v. Gatacre*, 5 Bing. N. C. 608.

(*c*) *Thompson v. Leach*, 2 Salk. 427; 2 Vent. 198.

(*d*) *Purefoy v. Rogers*, 2 Wms. Saund. 380.

(*e*) *Egerton v. Massey*, 3 C. B. N. S. 338; and see *Fearne, C. R.*, Ch. V. p. 316; as to 'Merger,' see *post*, Part IV. Chap. IV.

(*f*) *Fearne, C. R.* 341; *Archer's Case*, 1 Co. 66; *Plunket v. Holmes*, Raym. 28, 1 Lev. 11.

heritance were limited to the same person by the conveyance which interposed the contingent remainder (a).

Whilst contingent remainders were liable to fail by such premature determination of the particular estate, it was the practice, where it was required to settle a particular estate for life with contingent remainders, (as is usual in family settlements of land on parents for life with remainders to their future children,) to limit an estate to trustees and their heirs by way of remainder upon the determination of the estate for life by forfeiture or otherwise in the lifetime of the tenant for life, such estate to continue during the life of the tenant for life.

This estate of the trustees, being a vested remainder by reason of the possibility of the particular estate for life determining during the lifetime of the tenant for life, though uncertain as to ever coming into possession, was sufficient to support the contingent remainders (b). And it was declared to be held upon trust for the prior tenant for life and to preserve the contingent remainders; therefore any alienation or dealing with the estate tending to the destruction of the remainders was a breach of trust for which the trustees were responsible, and which might also affect those claiming title through them (c). In the absence of an express trust for preserving contingent remainders, such a trust could not be implied, even in a will, and the remainders were destructible without breach of trust (d).

The limitation to trustees to preserve contingent remainders was rendered unnecessary by the above statute, as against the forfeiture, surrender, or merger of the particular estate. But it may still be necessary or

Trustees to preserve contingent remainders.

Estate of trustees.

Trusts of the estate.

Trustees to preserve contingent remainders against the regular determination of the particular estate.

(a) *Fearne*, C. R. 345; *Bowles's Case*, 11 Co. 80 a.

(b) See *ante*, p. 323. *Fearne*, C. 217, 326; *Smith v. Packhurst*, 3 Atk. 135, Willes, 327.

(c) *Fearne*, C. R. 326; *Mansell*

v. Mansell, 2 P. Wms. 678; see *Biscoe v. Perkins*, 1 V. & B. 485; 3 Mer. 456.

(d) *Collier v. Walters*, 43 L. J. C. 216; L. R. 17 Eq. 252.

expedient in some cases for preserving contingent remainders against the regular determination of the particular estate:—as in the case of a settlement on A. for life, with remainder to the first son of A. who shall attain twenty-one; to preserve which remainder the estate of the trustees must be extended to cover not only the life of A. but the possible minority of a son after his death (*a*).—So in case of a limitation to A. for life with remainder to the heir of B., in which case the estate of the trustees must be extended to the life of B.—So where the estate for life is determinable by a conditional limitation, as where it is subject to a shifting clause or proviso for cesser in a certain event, there must be a vested estate in trustees to take effect upon such determination in order to preserve contingent remainders until the expiration of the life (*b*).—So where it is required to limit contingent remainders upon a term of years, a vested estate of freehold must be limited to support them (*c*).

Contingent remainder of copyholds.

A contingent remainder of copyhold was never liable to fail by the premature determination of the particular estate by forfeiture or merger; because, the freehold remaining in the lord, the copyhold estate was not subject to the rules peculiar to the freehold which caused the failure of contingent remainders, and the lord was bound to admit to the tenancy according to the limitations of the surrender. Hence trustees to preserve contingent remainders were not required or employed in the settlement of copyholds, as they were in freeholds, to guard against the like dealings or casualties affecting the particular estate (*d*).

(*a*) See 1 Jarman on Wills, 787.

(*b*) See *Lambarde v. Peach*, 4 Drew. 553; 28 L. J. C. 569.

(*c*) See *Egerton v. Brownlow*, 23 L. J. C. 348; 4 H. L. C. 1; and

see further as to the necessity of such limitation, Butler's note (*e*) to Fearn, C. R. 221.

(*d*) See *ante*, p. 82; Fearn, C. R. 319, 320; Scriven on Cop. 401, 404, 4th ed.

For the same reason a copyhold may be surrendered to the use of a person for an estate, freehold as to quantity, to commence *in futuro* or upon a contingency, without a preceding vested estate to support it. But if a copyhold be surrendered to uses in the form of a particular estate with a contingent remainder, the remainder must vest before or at the determination of the particular estate, according to the rule of common law, otherwise it cannot take effect as intended by the terms of limitation (a). A contingent remainder of copyhold may also be destroyed by an enfranchisement, conveying the freehold to the tenant of the particular estate; for the consequence is to extinguish that estate and destroy the tenure (b).

Must vest before determination of particular estate.

Destroyed by enfranchisement.

If land be limited to a person for life with remainder to his unborn child or children, the land is thereby rendered inalienable, by reason of the uncertainty as to the owner, until a child is born in whom the remainder may vest, or until the life estate is determined without such child coming into existence; and if the remainder were limited to such child for life, it would, on becoming vested, support a contingent remainder to the child of such child, which would be inalienable until such latter child came into existence; and thus by a series of contingent remainders for life estates to children of successive generations the land might be settled inalienably for an indefinite period, if no rule of law intervened to prevent it (c).

Remainder to unborn child.

(a) Seriven on Cop. 404.

(b) *Doe v. Briggs*, 16 East, 406; see *ante*, p. 97.

(c) All contingent remainders were inalienable by direct conveyance at common law; but if limited to a certain owner they might be released, or devised by will, and were assignable in equity; they were also alienable by way of estoppel, that is by a fine or deed

dealing with such interest as if vested, which the owner upon the remainder becoming vested was estopped from contradicting. Contingent remainders were made alienable by deed by the statute 8 & 9 Viet. c. 106, s. 6. Fearn, C. R. 366; see *Crofts v. Middleton*, 8 D. M. & G. 192; 25 L. J. C. 513; and see *post* Part IV. Chap. I. 'Power of Disposition.'

Remainder to
child of unborn
child is void.

Such limitations are restricted by the positive rule of law that a remainder cannot be limited to the issue of a person unborn. A remainder may be limited to an unborn child of a living person, who must come into being during the continuance of the particular estate, but not to a child or more remote issue of such child, for the vesting in such case might be indefinitely postponed (*a*).

Accordingly, where land has been limited in a series of limitations such as follows:—To A. for life, with remainder to the first son of A. for life, with remainder to the first son of the first son of A. for life, and so on,—under which limitations, if allowed, the successive owners would be non-existent for an indefinite period, and there would be no power of dealing with their interests until they came into being,—such limitations have in all cases been held void beyond the first generation of unborn issue of the first tenant for life (*b*).

Remainder to
unborn child for
life.

The remainder to the unborn child of a living person may be limited for life or other particular estate; and the further remainder may be limited over subject to the restriction of the above rule (*c*).

This rule is said to be derived from Coke's doctrine

(*a*) "In the case of a limitation of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void; and there is no carrying the estate to them, but by comprising them in the extent of the estate limited to their parents, namely, to the unborn children of the person *in esse*; that is, by giving such unborn children of the person *in esse* an estate tail." Fearn, C. R. 502; see Butler's note to Fearn, C. R. 565. Gilbert on Uses, by Sugden, p. 268; Sugden on Powers, 393, 8th ed. and the authorities there cited; 1 Jarman on Wills, 221, 239; *per* Lord Kenyon, C. J. *Brudenell v. Elwes*, 1 East, 442, 452;

Duke of Marlborough v. Earl Godolphin, 1 Eden, 404, 415.

(*b*) See the limitations in *Humberston v. Humberston*, 1 P. Wms. 332; *Seaward v. Willock*, 5 East, 198; *Beard v. Westcott*, 5 Taunt. 393; 5 B & Ald. 801; *Brooke v. Turner*, 2 Bing. N. C. 422; *Trash v. Wood*, 4 M. & C. 324.

(*c*) *Evans v. Astley*, 2 Bl. 523, *per* Wilmot, C. J.; *per* Kenyon, C. J., 3 T. R. 86, in *Hay v. Coventry*, 1 East, 452, in *Brudenell v. Elwes*; *Routledge v. Dorril*, 2 Ves. jun. 357. The dictum of Buller, J., to the contrary, 2 T. R. 253, in *Robinson v. Harcastle*; also *Hayes v. Hayes*, 4 Russ. 311, are not law. Sugden on Powers, 393, 8th ed.; 1 Jarman on Wills, 239.

that the contingency upon which a remainder may be limited must be a common possibility, and not a remote possibility or a possibility upon a possibility ; a doctrine which, beyond being the alleged source of this rule, seems to be of very doubtful meaning and application (*a*).

Hence it appears that the only mode of providing in a settlement of land for remoter issue than unborn children is by including them in the estate limited to their parents, that is, by limiting remainders to the unborn children in tail, under which their issue will take, if not barred by a disentailing deed of their ancestor. This form of settlement, namely, to a person for life with remainder to his children successively in tail, is commonly known as a "strict settlement" (*b*).

Strict settlement by estates for life with remainders to children in tail.

The remainder in tail may remain in contingency until the death of the tenant for life, and in the case of a posthumous child, during the further period of gestation. If the tenant in tail be an infant at the death of the tenant for life, he will not have power to bar his issue until he has attained full age, and the land may thus be inalienable for a further period of twenty-one years. Therefore the extreme time during which a settlement of

Limits of duration of strict settlement.

(*a*) Fearn, C. R. 250 ; Butler's note to Fearn, p. 565 ; see 2 Co. 51 *a* ; 10 Co. 50 *b* ; Co. Lit. 184 *a* ; per Lord St. Leonards, in *Cole v. Sewell*, 4 Dr. & War. 1, 32 ; 12 Jurist, 927 ; 1 Sugden on Powers, 393, 8th ed. The learned author of the work on Perpetuities advanced the doctrine that remainders are regulated by the same general rule against perpetuities which is applied to future uses and trusts and executory devises, namely, that they must be limited to take effect within a life or lives in being and twenty-one years after ; and that the above restriction on the limitation of remainders is merely an application of the same rule. According to this doctrine the limita-

tion of a remainder to the child of an unborn child of a living person, if expressly restricted to the life of that person and twenty-one years after, would be good. It would also follow that all contingent remainders after a particular estate to an unborn person, unless expressly restricted to the period allowed by law, would be bad. Lewis on Perpet. ch. xvi. and see Supplement. But the authorities lay down the rule as stated above, simply that a contingent remainder cannot be limited to the child of an unborn person, without qualification or addition. The only other restriction being that it must vest pending the particular estate.

(*b*) Fearn, C. R., 502.

land may remain effectual under common law limitations is during a life or lives in being at the time of the settlement and twenty-one years afterwards, with a possible extension during the gestation of a posthumous child (a).

Cy pres doctrine
of construction
of wills.

Where a will devises in terms to the unborn child of a person for life, with remainder to the children or issue of such child, contrary to the above rule of law, but the will manifests the general intention that the land shall be descendible to the children and remoter issue in succession, it is in general construed to give an estate tail in the unborn child to which, if not barred, his issue may succeed instead of being absolutely excluded according to the strict rule of law. Thus, a devise to the unborn child for life, with remainders to his first and other sons in succession in tail, with remainder to his daughters in tail, will create an estate tail in furtherance of the general intention; so, if the remainders be confined to the sons only, it will create an estate tail male. This construction is founded on what is called the *cy pres* doctrine of effectuating the testator's general intention *as nearly as possible*, where it is impossible to carry it out in the particular terms expressed (b).

The *cy pres* doctrine is not applied where the general intention appears of creating a succession of life estates to the issue of the unborn person in perpetuity, and not a descendible estate in such issue (c).—But words of distribution amongst the issue, as tenants in common, may

(a) See Butler's note to Fearn, C. R. 562; 2 Pridaux Conv. 179, 7th ed. "The words 'in strict settlement,' in their ordinary sense, import estates limited to persons who are living, for life, with remainder in tail to unborn issue." 1 Beav. 71, in *Douglas v. Congreve*; see *ante*, p. 245.

(b) 1 Jarman on Wills, 260; Hawkins on Wills, 181; Prior on Issue, 58; see Butler's note to

Fearn, C. R. 204, and the cases there cited; *Pitt v. Jackson*, 2 Bro. C. C. 51; 2 Ves. jun. 349; *Humberston v. Humberston*, 1 P. Wms. 332; *Brooke v. Turner*, 2 Bing. N. C. 422; *Trask v. Wood*, 4 M & Cr. 324.

(c) 1 Jarman on Wills, 263; *Seaward v. Willock*, 5 East, 198; *Somerville v. Lethbridge*, 6 T. R. 213; see *Mortimer v. West*, 2 Sim. 274.

be rejected in furtherance of the general intention of giving an estate tail (*a*).

It does not apply where the estate of the ancestor is limited for a term of years only, as for a term of ninety-nine years if he shall so long live (*b*) ; nor does it apply as to persons born after the date of the will in the testator's lifetime, though as to others in the same class of unborn children, to whom and whose issue the devise is made, it may still apply (*c*) ;—nor does it apply where the remainder over is restricted to some only of the issue of the unborn tenant for life, as a first son only exclusive of the rest (*d*).

Limits of application of *cy pres* doctrine.

It does not apply to personal estate or chattels real (*e*) ; and it has never been applied to the construction of deeds (*f*).

The doctrine applies to appointments by will under powers ; and under such appointments there is further occasion for applying the doctrine where the remainders are void, not on the ground of perpetuity, but as being in excess of the power (*g*).

Applied to appointments by will under powers.

The limitation of a contingent remainder, as it conveys no estate, but only a possibility of an estate in a future event, does not interfere with the limitation of the freehold subject to the contingency. Thus, a contingent remainder for life or in tail may be followed by the limitation of a vested remainder ; and such vested remainder will give place to the contingent remainder upon its becoming vested during the continuance of the particular estate. As if land be limited to A. for life,

Contingent remainder for life or in tail with vested remainder.

(*a*) *Pitt v. Jackson*, 2 Bro. C. C. 51 ; *Vanderplank v. King*, 3 Hare, 1 ; see *ante*, pp. 178, 185.

(*b*) *Somerville v. Lethbridge*, 6 T. R. 213 ; *Beard v. Westcott*, 5 Taunt. 393.

(*c*) *Vanderplank v. King*, 3 Hare, 1.

(*d*) *Monypenny v. Dering*, 2 D.

M. & G. 145 ; 22 L. J. C. 313.

(*e*) *Routledge v. Dorril*, 2 Ves. jun. 357.

(*f*) *Brudenell v. Elwes*, 1 East, 442 ; 7 Ves. 390.

(*g*) Sugden on Powers, 498, 8th ed. ; see *post*, p. 418 ; *Pitt v. Jackson*, 2 Bro. C. C. 51 ; *Griffith v. Harrison* 3 Bro. C. C. 254.

with remainder to his first and other sons successively in tail, with remainder to B. for life, with remainder to his first and other sons successively in tail, with remainder over (a).

Contingent remainder in fee.

The law is stated by Fearn, with reference to conveyances at common law, that "where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested"; but two or more several contingent remainders in fee may be limited as substitutes or alternatives one for the other, so that one only take effect, and every subsequent limitation be substituted for the former if it should fail of effect (b).

Alternative contingent remainders in fee.

Contingent remainder in fee with vested remainder.

But "where a remainder of inheritance is limited in contingency by way of use, or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and his heirs, or in the heirs of the testator until the contingency happens to take it out of them" (c). And it has further been decided that upon a devise of a contingent remainder in fee, the fee subject to the contingency will pass as a vested remainder under the will by a specific or residuary devise (d).

Limitations united subject to intervening remainder.

Where the particular estate and ultimate remainder are limited at the same time to the same person, though they

(a) Fearn, C. R. 222; *Chudleigh's Case*, 1 Co. 120 a.

(b) Fearn, C. R. 225, 373, and the cases there cited; *Loddington v. Kime*, 1 Salk. 224; 1 L. Rayn. 203; *Doe v. Elvey*, 4 East, 313; *Doe v. Ford*, 23 L. J. Q. B. 53.

(c) Fearn, C. R. 351, and cases there cited; *Purefoy v. Rogers*, 2 Wms. Saund. 380; *Doe v. Scudamore*, 2 B & P. 289; and in common law conveyances "there seems to be no reason why the fee does not remain in the grantor and his heirs till the contingency happens." 2 Wms. Saund. 382.

(d) *Egerton v. Massey*, 3 C. B. N. S. 338; 27 L. J. C. P. 10, and see *Perceval v. Perceval*, L. R. 9

Eq. 386. The case of *Egerton v. Massey* seems to render doubtful the proposition of Fearn above stated, that where there is a contingent remainder in fee no vested remainder can be limited. In that case there was a devise for an estate for life, with a contingent remainder in fee, and a residuary devise; and it was held that the residuary devise passed the vested remainder in fee, and that consequently by a subsequent union and merger of the estate for life in such vested remainder, the contingent remainder was destroyed. Williams, J., there said, "It is clear that the notion of the fee being in abeyance cannot now be sustained."

may become united by the doctrine of merger or under the rule in *Shelley's* case for most purposes, they do not exclude intervening contingent remainders from taking effect upon the happening of the contingency during the particular estate ;—as if land be limited to A. for life, with remainder to the first and other sons of A. successively in tail, with remainder to A. in fee, the limitations unite in A. until the birth of his first son, when the contingent remainder becomes vested and divides them (a).

So, if there be several contingent remainders, a subsequent one, may become vested before a preceding one but subject to giving place on the preceding one becoming vested during the particular estate which supports it (b).

Several
contingent re-
mainders.

Where a contingent remainder is followed by other limitations a question of construction may arise, whether the contingency affects the first estate only or extends to the subsequent limitations (c).

Contingency
affecting subse-
quent limita-
tions.

Upon the general principle of construction in favour of the vesting of estates, a remainder is never construed as contingent if it can be taken as vested.—Words of futurity or contingency are *primâ facie* referred to the commencement or duration of the estate in respect of possession, and not to the vesting; as in the simple case of a limitation to A. for life and *after his decease* to B., the estate of B. is not contingent upon B. surviving A., but is an immediately vested remainder (d).

Construction of
remainders as
vested or con-
tingent.
Words of con-
tingency referred
to possession
rather than
vesting.

So, in the case of limitations expressed to be *in default of*, or *for want of*, or *upon failure of*, the objects of prior limitations, such expressions are *primâ facie* referred to the determination or failure of the prior estates limited and not to the failure of the objects to whom they are limited, and are commonly employed merely to carry on the series of limitations in the sense of the word *remain-*

Limitations over
*in default, for
want, etc.*, of
objects of prior
limitation.

(a) Fearne, C. R. 36, 222, 345 ;
Bowles' Case, 11 Co. 79 b ; and see
ante, pp. 330, 331.

(b) Fearne, C. R. 224.

(c) Fearne, C. R. 233 ; 1 Jarman
on Wills, 752 ; *Doe v. Ford*, 23
L. J. Q. B. 53.

(d) See *ante*, pp. 238, 325.

der;—for example, if land be limited to A. for life, and after his decease to the first and other sons of A. for life or in tail and *in default of* such sons or *on failure of* such issue to B., the estate of B. is not contingent upon A. not having a son or issue, but is a vested remainder expectant on the determination of the prior estates, by the death of the sons or failure of issue (a).—If in such case the remainder be limited in default of sons or failure of issue in the lifetime of A. or of B. or other definite period, it is then contingent upon such events happening and the consequent determination of the prior estate within the prescribed period (b).

Devise to widow
until marriage
with devise over
upon marriage.

A strong example of this principle of construction occurs where a testator devises to his widow an estate for life determinable upon her marrying again, with a devise over *if she shall marry again*; the devise over is construed to give a vested remainder expectant upon the determination of the widow's estate, whether by marriage or death, and not a remainder contingent only upon her marriage (c). But a devise to the testator's widow absolutely for life, with a devise over in the event of marrying again does not admit of such construction, and the devise over is not a remainder but an executory devise; it cuts short the preceding limitation, and does not follow upon it (d).

Remainder con-
strued to vest as
soon as possible.

Upon the same principle remainders are construed to vest as soon as possible; and if once vested cannot be divested under the same limitation so as to admit of another person in substitution of the person in whom it has vested (e). Thus, a devise to A. for life with re-

(a) See 1 Jarman on Wills, 728, and cases there cited; *Hodgson v. Ambrose*, 1 Dougl. 337, "the words *for want of such issue* mean the same thing as *after such estate tail*." *Ib.* p. 340.

(b) See Fearne, C. R. 420; see *ante*, p. 325,

(c) See *ante*, p. 219; 1 Jarman on Wills, 731; *Gordon v. Adolphus*, 3 Bro. P. C. 306.

(d) *Ib.*; see *post*, p. 360; *Sheffield v. Lord Orrery*, 3 Atk. 282.

(e) *Driver v. Frank*, 3 M. & S. 25, 32, 37; *Doe v. Perratt*, 5 B & C. 48; 10 Bing. 198.

mainder to his second and other sons successively in tail, (excepting the first or eldest son,) A. then having no sons, was held not to give a contingent remainder to such person as should be the second son of A. at his death, but to the second son born, living an elder, who took on his birth an immediately vested and indefeasible remainder (a).—So, an ultimate remainder in a will to the testator's heir is construed as vesting at the death of the testator, and not as contingent to the person answering the description of heir at the determination of the particular estates (b).

A modification of the above principle of construction occurs with a remainder limited to a class of persons, as children, grandchildren, issue, brothers and sisters, cousins and the like, which, though vested, as soon as an object of the limitation can be ascertained, in that object, admits of other objects participating who become ascertained before or at the determination of the particular estate (c). Thus, if land be limited by settlement or will to A. for life, with remainder to his children, or to the children of B., the remainder is vested in all the children in existence when the instrument takes effect, or it becomes vested as soon as any come into existence;

Remainder to a class vests in all ascertained at determination of particular estate.

(a) *Driver v. Frank*, supra, and see a like construction in *Adams v. Bush*, 6 Bing. N. C. 164.

(b) *Doe v. Maxey* 12 East, 589; *Wrightson v. Macaulay*, 14 M. & W. 214; see *ante*, p. 161.

(c) "An exception is made to this general rule in the case of a bequest to A. for life, and after A.'s death to the children of B.; for in such case all the children of B. who come into existence before the death of A. are let in to share. But this exception is founded on a special reason, namely, the desire of the Court to let in as many of the children as possible, upon the assumption that such would be the desire of the testator.—It is how-

ever, to be particularly noted that this exception does not go to the extent of postponing till the death of A. the period for ascertaining the persons answering the description, so as to include only those who answer the description at the death of A. The children living at the testator's death still take, and they take vested interests transmissible to their representatives, subject only to be divested *pro tanto*, in order to let in others of the same class who may be born during A.'s life." *Per Kindersley, V. C.*, in *Lee v. Lee*, 1 Dr. & S. 86; 29 L. J. C. 788; and see *Baldwin v. Rogers*, 3 D. M. & G. 649; 22 L. J. C. 665; *Aylwin's Trusts*, L. R. 16 Eq. 585.

but it is subject to divesting *pro tanto* in favour of other children as they come into existence until the death of A., when the estate comes into possession, and no after born children can participate (a).

Remainder to children who shall attain 21.

If land be limited to A. for life, with remainder to such of the children of A. as shall attain twenty-one, the remainder is contingent upon children attaining twenty-one in the life of A. and vests in such children only (b).—In some cases the construction of the contingency as to age may be such as only to render the estates of the children defeasible upon not attaining the age (c).

§ 4. THE RULE IN SHELLEY'S CASE.

The Rule stated—application of the rule—where the remainders are contingent.

Remainder to heir as purchaser—remainder to heir with additional words of limitation.

Estate of freehold in ancestor—estate *pur autre vie*—estate determinable by conditional limitation—estate for years.

Limitations in separate instruments.

Limitations of estate *pur autre vie*—of term of years—lease for life with remainder to executors for term of years.

The rule in *Shelley's Case* stated.

Limitations in the form of remainders to the *heirs*, or to the *heirs of the body*, or in other terms designating persons taking in a course of descent, which taken alone would create a contingent remainder in the person answering to such designation, are modified in effect by the special rule of law known as the Rule in *Shelley's Case*.

This rule, in its simplest form, has been already referred to; it may be stated in more general terms as

(a) See 2 Jarman on Wills, 75; Hawkins on Wills, 71; Fearne, C. R. 312, and cases there cited.

(b) *Festing v. Allen*, 12 M. & W. 279; 5 Hare, 573; *Holmes v. Pres-*

cott, 33 L. J. C. 264; *Perceval v. Perceval*, L. R. 9 Eq. 386.

(c) See *Browne v. Browne*, 3 Sm. & Giff. 568; 26 L. J. C. 635; and see *ante*, p. 239, *post*, p. 367.

follows:—If an estate of freehold be limited to a person, and by the same deed or instrument an estate be limited in the form of a remainder, whether immediately expectant on the former estate or after other estates interposed, to “the heirs” or to “the heirs of the body” of the same person, the words “heirs” or “heirs of the body” are words of limitation of an estate of inheritance in the ancestor, and the heirs can take only by descent and not as purchasers (*a*).

Thus, limitations in the form, to A. for life and after his decease to his heirs, or with remainder to his heirs, are equivalent to the limitation to A. and to his heirs which denotes a fee simple in A. (*b*);—so a limitation to A. for life and after his decease to the heirs of his body, is equivalent to the limitation to A. and to the heirs of his body, and denotes an estate tail (*c*).

And if there be an intermediate estate interposed between the freehold estate and the limitation to the heirs, as to A. for life, with remainder to B. for life or in tail, with remainder to the heirs or heirs of the body of A., the latter limitation vests the remainder in A., and is equivalent to a limitation of the remainder in the terms to A. and to his heirs or to A. and to the heirs of his body; and in such cases the heir can take nothing except by descent from A. (*d*).

If the limitations intervening between the preceding freehold and the subsequent limitation to the heirs or heirs of the body are contingent, they are not destroyed by the rule; but, as long as there are no vested remainders intervening, the two limitations are united in the ancestor,

(*a*) See *ante*, p. 34; 1 Co. 104 a, *Shelley's Case*; Co. Lit. 22 b, 319 b, 376 b; Butler's note (1) to Co. Lit. 376 b; Hargrave's Law Tracts, 551, “Obs. on the Rule in Shelley's Case”; and see Blackstone's Argument in *Perrin v. Blake*, Ib. 489; S. C. 1 W. Bl. 672; 4 Burr. 2579; as to the application of the rule to Uses, see *post*, p. 349; and

to Wills, see *post*, p. 357.

(*b*) See *ante*, pp. 157, 160.

(*c*) See *ante*, pp. 171, 176; and see Fearn, C. R. 28, 29.

(*d*) Fearn, C. R. 29; Ib. 76 commenting on Douglas, 506 (note); *Coulson v. Coulson*, 2 Atk. 245; 2 Str. 1125; see *Doe v. Welford*, 12 A. & E. 61.

Application of rule.

Where there are intermediate remainders.

Intermediate contingent remainders.

subject to admitting the intervening limitations to take effect, if they become vested during the continuance of of the preceding freehold (*a*)

Contingent remainder to heirs.

The rule applies, where the remainder is limited to the heirs or heirs of the body of A. upon a contingency; as upon limitations to A. for life, and if A. die before B., to the heirs of A.,—or to A. and B. during their joint lives, with remainder to the heirs of him who dies first,—in such case A. takes the contingent remainder in fee, and the heir takes nothing except by descent (*b*).

Remainder to heirs as purchasers.

The word “heir,” however, may be used in a context or with an additional description rendering it incapable of being construed as a word of limitation, as in a limitation to the “heir male” or to the “heir now living”; and it must then be taken as a word of purchase giving a remainder, contingent or vested, to the person so designated (*c*).

Heirs with additional words of limitation.

But the import of the words ‘heirs’ or ‘heirs of the body’ as words of limitation within the rule is not affected by the addition of other words of limitation not altering the course of descent; thus, a limitation to A. for life, with remainder to the heirs male of the body of A. and the heirs male of the body of such heirs male, vests an estate tail male in A. by force of the rule; the additional words of limitation being construed as declaratory only, and not restrictive of the former (*d*).

Estate of freehold in the ancestor,—

pur autre vie,

The rule applies where the ancestor takes any particular estate of freehold, as an estate for life, or an estate tail (*e*)—or an estate *pur autre vie* (*f*).—So, it applies

(*a*) See *ante*, p. 339; Fearn, C. R. 36, 346. *Bowles’ Case*, 11 Co. 79 *b*.

(*b*) Fearn, C. R. 34; Co. Lit. 378 *b*; Perkins, s. 337; see *Crofts v. Middleton*, 8 D. M. & G. 192; 25 L. J. C. 513.

(*c*) See *ante*, pp. 158, 162, 179.

(*d*) *Shelley’s Case*, 1 Co. 93; see *ante*, p. 177; *Wright v. Pearson*, 1 Eden, 119.

(*e*) Lit. s. 719; Co. Lit. 376 *b*; *Goodright v. Wright*, 1 P. Wms. 397.

(*f*) Perkins, s. 337; Fearn, C. R. 31.

though the preceding estate of freehold be determinable by a conditional limitation, as an estate during widowhood (a). Determinable estate.

Accordingly, if there be a limitation to A. during the life of B., or to A. during widowhood, with remainder to the heirs or to the heirs of the body of A., the limitations unite under the rule in A., who takes a fee or fee tail in possession, notwithstanding the particular estate of freehold be limited to determine by possibility in the lifetime of A.;—and in such cases if there were intermediate remainders interposed between the freehold and the limitation to the heirs, A. would take a vested remainder in fee or in tail (b).

But the rule does not apply if the ancestor take only an estate for years and not a freehold estate. Estate for years in ancestor. The subsequent limitation to his heirs or to his heirs of the body does not then vest any estate in him, and can operate only by way of purchase to the heir designated; because by the common law a term of years or chattel interest does not affect the limitation of the freehold title subject to it (c). In such case if the limitation to the heirs be preceded by an estate of freehold in another, it may be good as a contingent remainder to the person answering the description of heir; as, if land be limited to A. for years, with remainder to B. for life, with remainder to the heirs of A., there is a contingent remainder to the heir of A., who will take in the event of A. dying before the determination of B.'s estate (d). But if it be not preceded by an estate of freehold it is wholly void (e).

The rule does not apply to limitations by separate instruments;—as where A. being tenant for life, with remainder to the heirs of B., afterwards granted his Rule not applied to limitations in separate instruments.

(a) See *ante*, p. 219; *Curtis v. Price*, 12 Ves. 89.

(b) *Fearne*, C. R. 30-34; *Perkins*, s. 337; *Curtis v. Price*, *supra*.

(c) See *ante*, p. 49.

(d) See *ante*, p. 327; *Co. Lit.* 319 b; *Fearne*, C. R. 50, 51; *Coape v. Arnold*, 4 D. M. & G. 574.

(e) See *ante*, p. 49.

estate to B., who thereby became tenant for the life of A. with remainder to his own heirs, and it was held that the remainder did not unite with the freehold of B., but remained to his heir in contingency (a). So where a father, seised in fee, settled the land on his son for life, retaining the reversion in himself, and afterwards by his will, reciting that he had settled the estate on his son for life, devised the same after the son's death to the heirs of his body; it was held that the estate for life being by one instrument and the limitation to the heirs by another could not unite, and the latter took effect as an executory devise to the heir (b).—A will and a codicil or schedule to it are considered as one instrument within the rule (c).

An apparent exception to the rule requiring the limitations to be in the same deed or instrument occurs where uses appointed under powers may be taken as if inserted in the instrument creating the power (d).

Rule not applied to limitations of estate *pur autre vie*.

The rule only applies to the limitations of estates of inheritance. In limiting estates *pur autre vie* the words "heirs," or "heirs of the body," must be construed according to the nature of the estate, and become merely a designation of the person to take as special occupant in case of a vacancy on the death of the grantee before the determination of the estate (e).

Limitations of term of years.

If a term of years be limited, by way of trust or executory bequest, to A. for life with remainder to his heirs or to the heirs of his body, these words are, in general, taken as analogous to words of limitation and not as words of purchase, and vest the whole term in

(a) 2 Leon. 7; Fearne, C. R. 71.

(b) Fearne, C. R. 71. *Doe v. Fommerceau*, Dougl. 487, and cases there cited; see *per* Kenyon, C. J., 5 T. R. 95, in *Habergham v. Vincent*; S. C. 2 Ves. jun. 204, 235.

(c) *Hayes v. Foorde*, 2 W. Bl.

698. See *Coape v. Arnold*, 4 D. M. & G. 574; 24 L. J. C. 673.

(d) Fearne, C. R. 74; see *post*, p. 376.

(e) See *ante*. p. 193; Fearne, C. R. 495; *Williams v. Jekyl*, 2 Ves. sen. 681.

A. (a).—Accordingly, if a testator devise real and personal estate to A. for life and after his death to the heirs of his body, A. becomes tenant in tail of the real estate and takes the personal estate absolutely (b).—So, if the limitation be to A. for life and after his death to his issue, A. takes the absolute interest (c).

But if the limitation over be made to heirs or issue of a restricted or particular kind or designation, or for particular estates inconsistent with the import of such words as words of limitation, or if there be other sufficiently marked intention that they should take as purchasers, the rule will not apply; and the limitation to the heirs or heirs of the body can operate only by way of a future trust or executory bequest of the term to them as purchasers (d).

By analogy to the rule in *Shelley's case*, "If a man make a lease for life to one, the remainder to his executors for twenty-one years, the term for years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance, (as if an estate for life be made to A. the remainder to B. in tail, the remainder to the right heirs of A., the fee vesteth in A. as it had been limited to him and his heirs,) even so are the testators and the executors *correlativa* as to any chattel. And therefore if a lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors" (e).

To heirs, etc.,
as purchasers.

Lease for life
with remainder
to executors for
term of years.

(a) See *ante*, p. 202; Fearn, C. R. 490; 2 Jarman on Wills, 489, 490; *Theobridge v. Kilburn*, 2 Ves. sen. 233; *Garth v. Baldwin*, 2 Ves. sen. 646; *Earl Verulam v. Bathurst*, 13 Sim. 374.

(b) *Garth v. Baldwin*, *supra*, "a limitation of personal estate to one for life and the heirs of his body, vests absolutely, whether so intended by the testator or not." *per* Hardwicke, L. C. *Ib.* p. 661. See

Britton v. Twining, 3 Mer. 176.

(c) 2 Jarman on Wills, 494; *Att.-Gen. v. Bright*, 2 Keen 57.

(d) 2 Jarman, 497, 498; Fearn, C. R. 492; see *ante*, pp. 177, 184.

(e) Co. Lit. 54 b; but see *Cranmer's Case*, 3 Leon. 20; Dyer, 309 a, where a distinction was made as to limitations in the above form by way of use, and it was held that the executor (if any) took by purchase. The old cases upon the construction

Accordingly where the trusts of personal estate were limited to A. for life, subject to a conditional limitation determining his estate upon bankruptcy, and after the death of A. to his executors and administrators, it was held that A. took the absolute interest, subject only to the condition (a). The rule also applies, if the remainder be limited "to the personal representative" of A. (b).

Remainder to
next of kin.

"But there is a great difference between a limitation to the executors and administrators and a limitation to the next of kin. The former is, as to personal property, the same as a limitation to the right heirs, as to real estate; but a limitation to the next of kin is like a limitation to heirs of a particular description, which would not give the ancestor, having a particular estate, the whole property in the land. The meaning of 'next of kin' must be those who answer the description at the time of death." Accordingly, the limitation of trusts of personalty for life with ultimate remainder to the next of kin, gives an interest for life only, and the next of kin at death take the interest in remainder (c).

of such limitations are very contradictory; they are exhaustively collected and discussed in Williams on Ex. 584-589, 4th ed. According to Dyer, C. J., in *Cranmer's Case*, "If land be leased to A. for life, the remainder for years to his heirs, the remainder for years is in abeyance until the death of the lessee, and then it shall vest in the heir as a purchaser."

(a) *Webb v. Sadler*, L. R. 8 Ch. 419; 42 L. J. C. 498; "A gift to A. for life, and after his death to his legal personal representative, is a

valid absolute gift to A." *Per James, L. J. Ib.* See *Webb v. Earl of Shaftesbury*, 3 M. & K. 599; *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572; 42 L. J. P. C. 49.

(b) *Best's Settlement*, 43 L. J. C. 545.

(c) *Anderson v. Dawson*, 15 Ves. 532, see *per Grant, M. R. Ib.* p. 536. As to a gift to "executors and administrators" meaning to next of kin, see *Palin v. Hills*, 1 M. & K. 470; *Webb v. Sadler*, *supra*.

SECTION II. FUTURE USES.

Future uses limited as remainders—application of the rule in *Shelley's* case.

Springing and shifting uses—examples of springing uses—examples of shifting uses.

Resulting use until springing use takes effect—construction of limitation to the use of the heirs of the body of the grantor—limitation to the use of the heirs of the body of another.

Future use after preceding estate construed as a remainder if possible—limitation which cannot take effect as a remainder.

Future uses limited by way of remainder expectant upon a particular estate are reduced by the statute of Uses into precisely the same position as common law limitations in the same terms, and are subject to the rules of the common law regulating remainders. Accordingly, in the limitation of uses a contingent remainder of freehold requires a particular vested estate of freehold to support it; and it must vest before or at the determination of the particular estate (a).

Future uses limited as remainders.

The rule in *Shelley's* case applies to limitations of the use by way of remainder to heirs or to heirs of the body, after a prior limitation of the use for a freehold estate to the ancestor, in the same manner as it applies to limitations of the freehold at common law (b).—And

Application of the rule in *Shelley's* case.

(a) See *ante*, p. 112; 1 Co. 130 a, 135 a, *Chudleigh's Case*; Sugden's note to Gilbert on Uses, 164; Sugden on Powers, 34, 8th ed. "Before the statute of Uses, if there had been a feoffment to the use of A. for years, remainder (of the use) in contingency, the contingent use would have been good, for the feoffees remained tenants of the legal freehold; but since that statute it is otherwise, for now no estate re-

mains in the feoffees." Fearn, C. R. 284.

(b) See *ante*, p. 342; Bacon on Uses, 62, Rowe's ed. note (e); "If A. make a feoffment in fee to the use of B. for life, and after to the use of C. for life or in tail, and after to the use of the right heirs of B., B. hath the fee simple in him (in remainder) as well where it is by way of limitation of use, as when it is by act executed." Co. Lit. 319 b.

the rule in *Shelley's* case has an extended application to uses by reason that the ancestor may in certain cases take a particular estate of freehold by implication without express limitation (a).

But the application of the rule is confined to future uses which are limited by way of remainder to arise upon the determination of the preceding estate, and is not extended to those uses, presently to be noticed, which take effect in substitution of the prior use and not as remainders (b).

Springing and
shifting uses.

A limitation of the use may be made for a freehold estate to commence *in futuro*, without any preceding limitation; also a limitation of the use may be made to take effect in defeasance or substitution of a preceding limitation, and not by way of remainder expectant upon its determination. Such limitations of the freehold at common law were void as placing the immediate freehold in abeyance, or as shifting the freehold without any act or ceremony; but as limitations of the use they were valid before the statute, and by force of the statute are executed as legal estates (c).

Uses of this kind, are called springing or shifting uses:—The term *springing* uses being applicable to those that arise without any preceding limitation of the use;—and the term *shifting* uses being applicable to those which take effect in substitution or defeasance of other uses previously limited (d).

Examples of
springing uses.

Examples of springing uses occur,—upon a bargain and sale to another after seven years (e), or after the

(a) *Pybus v. Mitford*, 1 Mod. 159; 1 Vent. 372; see *post*, p. 353.

(b) *Fearne*, C. R. 276.

(c) *Ante*, pp. 47, 113; 1 Sanders on Uses, 136.

(d) Sugden's note to Gilbert on Uses, p. 152; Sugden on Powers,

26, 8th ed. Springing or shifting uses, which are left to future appointment, are known as Powers, and are treated hereafter in a separate section. See *ante*, p. 114; and *post*, p. 374.

(e) Bacon on Uses, 63; Rowe's note (i), *lb*.

death of the bargainor, or upon any other specified future event (*a*).—Also upon a covenant to stand seised to the use of another after the covenantor's death, or to the use of the heirs or heirs of the body of another after his death (*b*).

So upon a conveyance operating to transfer the legal estate, with a declaration of the use to A. and his heirs after four years, or after the death of the grantor, or to the use of the heirs of A. after the death of A., such uses are good springing uses (*c*). But though the uses are deferred, the conveyance of the seisin to serve the uses must be immediate, because a freehold cannot be conveyed *in futuro* by any mode of conveyance operating only at common law (*d*).

Examples of shifting uses occur,—if land be conveyed to the use of A. and his heirs, and if B. should pay him a certain sum, then to the use of B. and his heirs;—or to the use of A. and his heirs, and if he should not pay a certain sum of money to B. at an appointed time, then to the use of B. and his heirs;—the uses limited to B. are good shifting uses, which arise and vest in defeasance of and substitution for the estate previously vested in A. (*e*).

Examples of shifting uses.
On payment or non-payment of money.

A common example of shifting uses occurs in marriage settlements, where the uses are declared to the settlor and his heirs until the marriage, and from and after the marriage to the uses of the settlement (*f*).

On marriage.

Where the uses are declared to A. and his heirs, and in case of failure of his issue at his death, or if he should

On failure of issue.

(*a*) *Osman v. Sheafe*, 3 Lev. 370; *Parsons v. Mills*, 2 Roll. Abr. 786.

(*b*) Sanders on Uses, 137; *per* Hale, C. J., in *Pybus v. Mitford*, 1 Mod. 98; 1 Vent. 372; *Roe v. Tranmer*, 2 Wils. 75.

(*c*) *Davies v. Speed*, Salk. 675; 12 Mod. 39, *per* Holt, C. J.; Sanders on Uses, 137.

(*d*) See *ante*, p. 117; *Roe v.*

Tranmer, 2 Wils. 75.

(*e*) Sanders on Uses, 144; Fearn, C. R. 274.

(*f*) *Hayes Conv.* 55 n (47). Where the intended marriage was illegal, it was held that the subsequent limitations did not take effect upon the solemnization of it. *Chapman v. Bradley*, 33 Beav. 61; 33 L. J. C. 139.

die without issue in the lifetime of B., or upon failure of his issue within any other definite period (not being too remote), then to other uses, the uses over are good shifting uses defeating the fee previously limited to A. But a limitation over upon the failure of issue of A. indefinitely would be void for remoteness; it is therefore construed as restraining the word *heirs* in the prior limitation to mean the *heirs of his body* only; and the limitation over then takes effect as a remainder after the estate tail of A. (a).

On succeeding to other estates, etc.

Where estates are limited in a settlement with a direction that in certain specified events, they shall cease and go over to the use of other persons; as if the tenant in possession under the settlement shall become entitled or succeed to some other settled estate, or title (b);—or if he shall refuse or neglect to take the name and arms of the settlor (c);—or if he shall refuse or neglect to reside upon the estate (d);—the limitations over in all such cases operate by way of shifting uses (e).

Resulting use until springing use takes effect.

Where a future use is limited as a springing use without any preceding limitation of the use, whether in a conveyance operating with or without transmutation of possession, the whole use results to or remains in the grantor, until the springing use takes effect to displace it. The springing use thus operates upon the resulting use in the same manner as a shifting use does upon the preceding limitation (f). The use cannot remain in or

(a) See *ante*, p. 170, 181; *post*, Sect. V. 'Rule against Perpetuities,' p. 445.

(b) *Ante*, p. 218; 1 Jarman on Wills, 780, and cases there cited; *Cope v. Earl Delawarr*, L. R. 8 Ch. 982; 42 L. J. C. 870; *Meyrick v. Mathias*, L. R. 9 Ch. 237; 43 L. J. C. 521.

(c) *Doe v. Yates*, 5 B & Ald. 544

1 Jarman on Wills, 848.

(d) See *Johnson v. Foulds*, L. R. 5 Eq. 268; 37 L. J. C. 260.

(e) As to provisos for ceaser in such cases, see *ante*, p. 217.

(f) See *ante*, p. 107; *per Holt*, C. J. *Davies v. Speed*, 2 Salk. 675; 12 Mod. 39; Sugden's note to Gilbert on Uses, 161; Sugden on Powers, 32, 8th ed.

result to the grantor for a particular estate only, so that the limitation of the springing use shall operate by way of remainder (a).

The limitation of the use to the heirs of the body of the grantor, without any express preceding limitation does not create a springing use; but there is implied a limitation or restriction of the use in the grantor for life, which, coalescing with the limitation to the heirs of his body by the rule in *Shelley's* case, gives him a vested estate in tail. This construction was made in a case where a person seised in fee, covenanted to stand seised to the use of the heirs of his own body, with remainder to his own right heirs; it was held that there was an implied limitation of the use to himself for life, which combining with the limitation to the heirs of his body created in him a vested estate tail in possession (b).—So, upon a feoffment in fee to the use of the heirs of the body of the grantor, it was held that there was an implied limitation of the use to the grantor for life, which united with the limitation of the use to the heirs of the body and gave an immediate estate tail to the grantor (c).

Upon a conveyance in fee to the use of the heirs of the body of A. and for want of such issue to the heirs of A., it was held that no such limitation of the use for life could be implied in favour of A., not being the grantor; that the limitation of the use to the heirs of the body of

Construction of limitation of the use to the heirs of the body of the grantor.

Limitation of the use to the heirs of the body of A.

(a) 1 Hayes Convey. App. II. on the statute of Uses, 2. Where it is concluded, "that by no possibility can a *particular* estate of freehold, in any case, result to or remain in the grantor, or covenantor," p. 465, 5th ed. Rowe's note 137 to Bacon on Uses, p. 63; see 1 Sanders on Uses, 139 on the same passage of Bacon.

(b) *Pybus v. Mitford*, 1 Ventr. 372; 1 Mod. 159; Co. Lit. 22 b, *Fenwick v. Mitford*; Fearn, C. R. 41, 48; *Wills v. Palmer*, 5 Burr. 2626.

(c) 1 Sanders on Uses, 137, 138, and authorities cited in note. Sanders there says that the use results to the grantor for his life by way of particular estate, "upon the true construction of the statute of Uses; that so much of the use as the grantor has not disposed of, and no more, results to him." But according to the later opinions above stated in note (a), a particular estate cannot remain in the grantor by way of *resulting use*, and therefore it must be created by an implied construction of the limitations.

A. being limited *in presenti* and not *after the death* of A. was void; and that the ultimate limitation of the use to arise after the indefinite failure of issue was void as being too remote (a).

Limitation of future use construed as a remainder if possible.

Where a future use is limited after a preceding limitation of the use, if the future limitation may take effect as a remainder, it is to be so taken, and becomes subject, as a remainder, to the rules of the common law; and though in the event it fail as a remainder, it cannot be supported as a springing use. Thus where a settlement was made to the use of A. for life with remainder to the use of the children living at the death of the survivor of A. and B., it was held that as, if A. survived, the children would have taken by way of remainder, the limitation must be construed as a remainder and not as a springing use, and therefore, as B. in fact survived, the limitation, being still in contingency when the particular estate determined by the death of A., failed altogether (b).

Upon this principle where lands were conveyed in fee to the use of the grantor for a term of years, if he should so long live, with remainder to the heirs of his body, the limitation to the heirs of his body was held void, as being a contingent remainder to the person answering that description, without an estate of freehold to support it (c).

(a) *Davies v. Speed*, Show. P. C. 104; 2 Salk. 675; 12 Mod. 38. The reports of this case are at variance and full of errors, consequently the above statement of the decision is rather conjectural. See the remarks on this case in Sugden's *Gilbert on Uses*, 162; Sugden on *Powers*, 33, 8th ed.; 1 Sanders on *Uses*, 140; Rowe's note (130) to *Bacon on Uses*; and see *post*, p. 445, 'Rule against Perpetuities.'

(b) *Hole v. Escott*, 2 Keen, 444; 4 M. & Cr. 187; the marginal note in the latter report does not state

the limitations correctly. And see *Goodtitle v. Billington*, Dougl. 753, 758; *Carwardine v. Carwardine*, 1 Eden, 27; Fearn, C. R. 388. But in the case of *Hole v. Escott* it was further decided that a power of appointing uses, after a use limited for a particular estate, might be well executed after the determination of the particular estate, and the uses would take effect as springing uses from the time of appointment, see *post*, 'Powers,' p. 376.

(c) See *ante*, p. 327; *Adams v. Savage*, 2 L. Raym. 855; 2 Salk.

Under such limitation an estate for the life of the grantor could not be implied, because the express limitation of the use to him for the term of years is inconsistent with such implication (a).

But where upon a conveyance in fee the uses were limited to A. for a term of years, if the grantor should so long live, and after the death of the grantor to the use of others for freehold estates, it was held that the grantor had an estate for life by implication, in order to support the future limitations of the freehold as remainders, there being nothing in the express limitation of the term of years to another person to prevent such implication (b). So where the uses were limited to A. for life with remainder to the heirs of the body of the grantor, it was held that the grantor took a vested estate tail in remainder, by an implied limitation of the use to him for life after the determination of A.'s life estate (c).

Limitation for life of grantor implied from limitations of the use at his death.

If the future use, though following a particular estate, be not limited by way of remainder, nor could take effect in any event as a remainder, as if the use be limited to A. for life, and after his death and one year or one day to the use of his children or the children of B., it seems that such future limitation, though void at common law, might operate effectually as a springing or shifting use (d). Such limitations are good by way of executory devise (e).

Future use which cannot take effect as remainder.

680. *Rawley v. Holland*, 22 Vin. Abr. 189. "In these cases it was solemnly decided that a use limited by way of remainder shall not be construed a springing use, although actually void in its creation if not so considered. Upon principle certainly it would seem that the limitations to the heirs of the body, in these cases, were good springing uses, unless indeed it be objected to them that they were limited *per verba de presenti*." Sugden's note to *Gilbert on Uses*, 167; see *ib.* p. 35, 176; Sugden on *Powers*, 36, 42, 8th ed.; Rowe's note (130) to *Bacon on Uses*; 1 Sanders on *Uses*, 142.

(a) *Ib.*; see the cases cited *ante*, p. 353, where such implication was made.

(b) *Penhay v. Hurrell*, 2 Vern. 370; 2 Freeman, 235, 258; cited and explained in Sugden's note to *Gilbert on Uses*, 169; Sugden on *Powers*, 37, 8th ed.

(c) See *ante*, p. 353; *Wills v. Palmer*, 5 Burr. 2615; 2 Bl. 687, explained in *Fearne*, C. R. 44.

(d) See *ante*, p. 318; 1 Spence Eq. Jur. 482, adopting the opinion stated in *Hayes Convey.* 120, 5th ed.

(e) *Fearne*, C. R. 398; 1 Jarman on *Wills*, 780; *post*, p. 363.

SECTION III. FUTURE DEVISES.

Devises by way of remainder—application of the rule in *Shelley's* case.

Executory devises.

Executory devise not preceded by estate of freehold—examples—

Freehold subject to the executory devise passes to the heir or residuary devisee.

Executory devise before determination of preceding estate—examples—effect in divesting preceding estate.

Executory devise after determination of preceding estate.

Alternative executory devises.

Future devise construed as remainder, if possible—remainder or executory devise according to events at or after testator's death.

Devise construed in favour of vesting—words of futurity referred to the possession rather than vesting—words of contingency referred to divesting rather than vesting—constructions restricting contingency—constructions extending contingency.

Devise to children—to after-born children—future devise to children—child *in ventre sa mère*—illegitimate children.

Remainders and
executory de-
vises.

Future estates and interests in land taking effect under the power of disposition by will are either by way of remainder as at common law or executory devise; the latter having been defined as “a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder” (a)

Devise of re-
mainders regu-
lated as at
common law.

A devise by way of remainder is regulated by the rules of common law. Accordingly, the devise of a contingent remainder must vest before or at the determination of the particular estate; if it do not so vest, it fails altogether, and cannot afterwards be supported as an executory

(a) 1 Jarman on Wills, 778; according to Fearné “an executory devise is such a limitation of a future estate or interest in lands, as the law admits in the case of a

will, though contrary to the rules of limitation in conveyances at common law.” Fearné, C. R. 386; as to the power of disposition by will, see *ante*, p. 68.

devise;—thus, where a devise was made to A. for life, with remainder to B. for a term of years if he should so long live, and after the deaths of A. and B. to the heirs of the body of B., it was held that the devise over to the heirs of the body of B., being a contingent remainder, failed by the death of A. before B., by which event the preceding freehold estate was determined before the remainder had become vested (a).—So, where the devise was to A. for life and after his death to the children of A. who should attain twenty-one, it was held that the devise to the children failed upon the death of A., leaving a child who did not attain that age until afterwards (b); and that a devise over if there should be no such child, being also a contingent remainder, failed under the same circumstances (c).

The rule in *Shelley's* case applies to limitations of remainders to *heirs*, etc., in wills in exactly the same manner as in conveyances at common law; that is to say, if a devise be made to a person for an estate of freehold, with a remainder, either immediately following that estate or after other intermediate remainders, to the *heirs* or *heirs* of the body of the same person, the word *heirs* is taken as a word of limitation and not of purchase, and the remainder vests in the ancestor, as if limited to *him and to his heirs* (d).

Accordingly, where land was devised to A. for life, with remainder to his first and other sons successively in tail, with remainder to the heirs of A., and A. died in the lifetime of the testator, it was held that the devise of the ultimate remainder lapsed and his heir took nothing, the word *heirs* being used as a word of limitation and not of purchase (e).

(a) *Doe v. Morgan*, 3 T. R. 763.
Challoner v. Bowyer, 2 Leon. 70;
 see *ante*, p. 327.

(b) *Holmes v. Prescott*, 33 L. J. C. 264.

(c) *Perceval v. Perceval*, L. R. 9 Eq. 386.

(d) See *ante*, p. 342; 2 Jarman on Wills, 241.

(e) *Doe v. Colyear*, 11 East, 548;

The rule has a wider scope in wills than in deeds, because in wills many words are capable of being used as equivalents of "heirs" or "heirs of the body," such as "issue," "children," and the like, to which, when so construed, the rule equally applies (a). Also in wills the limitation to the heirs of the body is sometimes implied, as on a devise to A. for life with a devise over upon failure of heirs of his body (b).

The rule does not apply to executory devises.

But the rule does not apply to executory devises which are limited to take effect in substitution or independently of the preceding estate, and not by way of remainder (c).

The rule is not dependent upon intention of testator.

The application of the rule in *Shelley's* case to wills is independent of any expressions of intention which do not enter into and affect the limitations upon which it operates. Intention rules and controls the separate limitations; but it cannot prevent or reach the legal consequences resulting from the limitations used. Accordingly where the will is construed as intending an estate of freehold to the ancestor, with a subsequent devise to his heirs in succession according to the regular course of descent, whether general or special, the rule applies and the heirs take only by descent, for the devise to the heirs cannot otherwise take effect in the course intended. And where the grounds for the application of the rule thus exist, no expression of an intention to exclude the rule can prevail. Expressions to the effect that the ancestor shall take for life *only*, or for life and *not otherwise*, and the like, or express restrictions of his power of alienation, are immaterial as regards the application of the rule, and are inoperative to exclude it (d).

Expressions restricting the estate of the ancestor.

Goodright v. Wright, 1 P. Wms. 397; *Hodgson v. Ambrose*, Dougl. 336.

(a) See *ante*, p. 180. *Doe v. Rucastle*, 8 C. B. 876.

(b) See *ante*, pp. 177, 182.

(c) See *post*, p. 360; as is the case with shifting uses, *ante*, p. 350.

(d) See Hargrave's "Obs. on the Rule in *Shelley's Case*," Tracts,

551; Fearne, C. R. 188-199; *per* Cockburn, C. J., *Jordan v. Adams*, 9 C. B. N. S. 483, 497. *Coulson v. Coulson*, 2 Atk. 245; 2 Str. 1125, where a devise to trustees interposed between the devise of the ancestor and the subsequent devise to the heirs, upon express trust to preserve the latter as a contingent remainder, was held not to exclude

If the devise to the heirs be attended with words of limitation, as a devise to the heirs of the body and *to the heirs of the body of such heirs*, or to the heirs of the body *and to their heirs*, or to the heirs of the body *for their lives*, the superadded words of limitation, so far as they are inconsistent with the course of descent imported by the prior words, are rejected as repugnant, and do not exclude the application of the rule (a). Thus under a devise to A. for life, "with remainder to the heirs of his body in tail," it was held that A. took an estate tail, and that the words "in tail" were superfluous (b).

Devise to the heirs with words of limitation.

So if the devise to the heirs be accompanied with words of distribution or other expressions inconsistent with an estate by descent, as a devise to the heirs or heirs of the body *in equal shares*, or *as tenants in common*, or *in such shares as the ancestor shall appoint* or the like, such expressions are rejected as repugnant (c).

With words of distribution.

But if it appear from the context of the will that in devising to the heir or heirs of the body the testator does not use those words in their technical meaning of a succession of persons in the regular course of descent, the rule has no application.—Thus, it may appear from the will that they are used to mean children or sons only (d);—so a devise to the heirs of A., "as if she had continued sole and unmarried," excludes all the lineal issue (e);—in such cases the conditions of the rule do not exist, and the persons designated by the word "heirs" take as devisees.

Devise to heirs with meaning explained by context.

If the devise over be to the "heir" or "heir of the body" in the singular number with words of limitation superadded;—as to the heir and to the heirs of such

Devise to "heir" with words of limitation.

the operation of the rule. And see *Hodgson v. Ambrose*, Dougl. 337; *Fearne*, C. R. 167, 174.

(a) See *ante*, p. 177, and the cases there cited.

(b) *Douglas v. Congreve*, 1 Beav. 59.

(c) See *ante*, p. 178; *per* Cock-

burn, C. J., *Jordan v. Adams*, 9 C. B. N. S. 498, and the cases there cited.

(d) *Jordan v. Adams*, 9 C. B. N. S. 483; see *ante*, pp. 179, 186.

(e) *Brookman v. Smith*, L. R. 6 Ex. 291; 7 Ib. 271; 40 L. J. Ex. 161.

heir (*a*),—to the heir male and to the heirs of such heir male, (*b*),—to the heir male and to the heirs male of the body of such heir male (*c*),—to the heir for life (*d*) ;—in all these cases the word heir becomes a word of purchase and the rule does not apply (*e*).

Executory devise.

An executory devise being the limitation by will of a future estate or interest in land, which cannot take effect as a remainder, it follows that “every devise of a future interest which is *not preceded* by an estate of freehold created by the same will, or which, *being so preceded*, is limited to take effect *before* or *after* and *not at the expiration* of such prior estate of freehold is an executory devise” (*f*).

Executory devise not preceded by estate of freehold.

Examples of executory devises not preceded by an estate of freehold occur ;—in a devise to A. to take effect six months after the death of the testator, or after the death of any other person living at the testator’s death,—or a devise to A. when he shall attain the age of twenty-one years,—such devises, though limiting a freehold to commence *in futuro*, are valid (*g*).

The above devises are executory or future by the express terms of limitation ; but a devise may also be executory from the devisee not being ascertained,—as a devise to the children of A., A. having no child at the death of the testator,—or a devise to the heirs or heirs of the body of A. after the death of A. (*h*).

(*a*) *Clark v. Day*, Moor, 593.

(*b*) *Chamberlayne v. Chamberlayne*, 6 E. & B. 625 ; 25 L. J. Q. B. 187, 357.

(*c*) *Archer’s Case*, 1 Co. 66 ; *Le-gate v. Sewell*, 1 P. Wms. 87 ; see *Hawkins on Wills*, 174.

(*d*) *White v. Collins*, Com. 289.

(*e*) See *ante*, p. 178.

(*f*) 1 Jarman on Wills, 778 ; see *ante*, p. 356. Compare *Fearne, C. R.* 395,—“Where a future interest without a preceding estate, or a con-

tingent interest unsupported by any preceding freehold, or any estate after a preceding vested fee simple, is limited by devise ; such limitation, as it cannot be good as a remainder, may take effect as an executory devise.”

(*g*) See *ante*, p. 68 ; *Fearne, C. R.* 395 ; 1 Jarman on Wills, 779 ; *Doe v. Hutton*, 3 B. & P. 643.

(*h*) See *ante*, p. 324 ; Jarman on Wills, *supra* ; *Rogers v. Gibson*, 1 Ves. sen. 485.

The devise of a preceding estate not of freehold has no effect upon the construction or operation of an executory devise, which takes effect according to the terms of limitation, subject only to the term, if it be then existing. As a devise to A. for a term of years, if he shall so long live, and after his death to the heirs of the body of A.; the limitation to the heirs, which would be void at common law as a contingent limitation without a vested freehold estate to support it, is valid as an executory devise (a).

Executory devise subject to term of years.

Where there is an executory devise without any preceding disposition of the freehold, the inheritance descends to the heir, and carries with it the intermediate rents and profits until the executory devise takes effect (b); or it may pass under a residuary devise (c).

Freehold subject to executory devise passes to heir or residuary devisee.

Examples of executory devises preceded by a devise of the freehold, but taking effect *before* the expiration of the preceding estate and therefore divesting that estate, occur:—upon a devise to A. and his heirs, with a devise over if he die under twenty-one (d),—upon a devise to A. and his heirs, with a devise over if he die under twenty-one and (or *or*) without issue (e),—or upon a devise to A. and his heirs, with a devise over if he die without issue

Executory devise divesting preceding estate.

Devise over upon death under 21, and without issue.

Devise over upon failure of issue.

(a) See *ante*, p. 327; 1 Jarman on Wills, 779; *Gore v. Gore*, 2 P. Wms. 27; *Harris v. Barnes*, 4 Burr. 2157; 1 Bl. 643. The like limitation of a springing use is void, see *ante*, p. 354.

(b) See above cases, *Fearne*, C. R. 537. *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Doe v. Hutton*, 3 B. & P. 643; as to intermediate profits, see *Hawkins on Wills*, p. 45; *Best v. Donmall*, 40 L. J. C. 160.

(c) *Fearne*, C. R. 544; *Stephens v. Stephens*, Cas. t. Talb. 228; *Wealthy v. Bosville*, Cas. t. Talb. 258; *Rogers v. Gibson*, 1 Ves. sen. 485.

(d) *Stephens v. Stephens*, Cas. t. Talb. 228. As to a devise to A.

and his heirs, with a devise over "if he die," see *post*, p. 368.

(e) *Right v. Day*, 16 East, 67. "It has been long settled that a devise of real estate to A. and his heirs, and in case of his death under twenty-one, or without issue, over, the word "or" is construed "and," and the estate does not go over to the ulterior devisee unless both the specified events happen." This construction is made in order to provide for the issue in case of the devisee dying under age leaving issue. It is not applied after an estate tail. 1 Jarman on Wills, 443; *Hawkins on Wills*, 203; *Mortimer v. Hartley*, 6 Ex. 47; see *Grey v. Pearson*, 6 H. L. C. 61; 26 L. J. C. 473; *ante*, p. 326.

living at his death, or if his issue fail within any other definite time, not being too remote (*a*).

Devises with
shifting clause.

So upon a devise to A. for life, or in tail, with a clause or proviso that in case A. shall become entitled to a certain other settled estate,—or in case A. shall neglect to take the name and arms of the testator,—or in case he shall neglect to reside upon the land, or the like, the estate shall go over to B.,—the estate then shifts upon the event specified by executory devise (*b*).

Effect in divest-
ing preceding
estate.

The devises over in the above cases are good executory devises, though limitations thus operating to defeat and shift the preceding freehold are void in conveyances at common law (*c*). The only difference between these executory devises and those before mentioned as not preceded by an estate of freehold, is “that in one case the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator, to the devisee of the executory interest” (*d*).

Divesting pre-
ceding estate in
part only.

The preceding estate is divested by the executory devise only to the extent of the estate thereby limited. Thus, if a devise be made in fee, with a devise over in a certain event to another for life, the prior devise is divested only to the extent of the life estate; but if the executory devise for life were limited to the same devisee to whom the fee is originally given, it would seem to be intended and to be construed as divesting the fee altogether and substituting a life estate, as where a testator devised to his daughter in fee, and that if she married without the consent of a certain person, she should have an estate for life only (*e*).

Substitution of
less estate.

(*a*) 1 Jarman on Wills, 780. See *Peter v. Bradley*, 3 T. R. 143; and see *post*, p. 446.

(*b*) See *ante*, pp. 218, 352. 1 Jarman on Wills, 780, and cases there cited; see *Meyrick v. Laws*, L. R. 9 Ch. 237; 43 L. J. C. 521, as to

the construction of a devise over on acquiring a settled estate.

(*c*) See *ante*, pp. 46, 47.

(*d*) 1 Jarman on Wills, 781.

(*e*) 1 Jarman on Wills, 782; *Wright v. Wright*, 1 Ves. sen. 409.

If the executory devise fail of taking effect or be or become void from any cause, as where the objects of such devise never come into existence, or where the event upon which it is limited to arise is too remote, or in fact never happens, or is or becomes impossible, the preceding estate continues according to its original limitation or destination (a); but if the executory devise fail by lapse, or death of the object before the testator, all other conditions having been satisfied, the estate passes to the heir or residuary devisee (b).

Devise over failing in effect.

A devise over limited to take effect in a specified event may operate by construction as a conditional limitation of the preceding estate determining it in the event specified, though it fail in effect in carrying the estate over by way of executory devise (c).

Effect of devise over as conditional limitation of preceding estate.

A devise of a future estate limited to take effect *after* the determination of a preceding estate may operate effectually as an executory devise;—thus upon a devise to A. for life, and after his death *and one day* to B., or to the children of B., the devise to B. or his children is a good executory devise, though such a limitation would be void at common law. A devise to A. for life and after his death to the children of B., B. as yet having no child, would be a contingent remainder.—The freehold, with the intermediate rents and profits, after the determination of the preceding estate until the executory devise takes effect, vests in the residuary devisee, if any, or if not, in the heir (d).

Executory devise over as conditional limitation of preceding estate.

(a) 1 Jarman on Wills, 783; *Jackson v. Noble*, 2 Keen, 590; see *Brookman v. Smith*, L. R. 6 Ex. 291; 7 ib. 271; 41 L. J. Ex. 114.

(b) 2 Jarman on Wills, 711.

(c) *Doe v. Eyre*, 5 C. B. 713; *Robinson v. Wood*, 27 L. J. C. 726, in which case Kindersley V. C., expressed his dissent from the doctrine of *Doe v. Eyre*, but followed it as the decision of a court of appeal; and see *ante*, p. 215, u. (a);

Sugden on Powers, 513. This doctrine as applied to a preceding estate in fee seems open to the objection of creating a fee simple determinable by conditional limitation; see *ante*, pp. 36, 217.

(d) 1 Jarman on Wills, 780; *Fearne*, C. R. 544; *Stephens v. Stephens*, Cas. t. Talb. 228. See *ante*, p. 47. See as to springing uses arising after a preceding estate, *ante*, p. 355.

Alternative executory devises.

Several executory devises, though including the whole interest, may be made by way of alternative limitations, so that any one of them may take effect if the others preceding it fail ; but upon one of such executory limitations taking effect and vesting the whole interest indefeasibly, then all the subsequent limitations become void and inoperative (*a*). The limitations may operate as a remainder, vested or contingent, in one alternative and as an executory devise in the other (*b*).

Future devise construed as remainder, if capable.

Devises of future estates are construed as remainders, if they are capable of that construction, and not as executory devises ; and when so construed are consequently liable to fail by the determination of the preceding freehold before they become vested (*c*).

Devise to A. in tail with devise over on death without issue.

Thus, if there be a devise to A. in tail with a devise over, if he die without leaving issue at his death, or upon failure of his issue within other definite time, the devise over is a contingent remainder, and not an executory devise, because the event on which it depends, namely, the failure of issue, determines the prior estate tail (*d*).—Upon a like principle, upon a devise to A. and to his heirs, with a devise over upon the failure of issue of A. indefinitely, the devise to A. is restricted to an estate tail and the devise over takes effect as a remainder, and not by way of executory devise, for as such, being postponed until an indefinite failure of issue, it would be void for

(*a*) Fearn, C. R. 514, and the cases there cited ; see Butler's note, *ib.* ; 2 Jarman on Wills, 504 ; *Stephens v. Stephens*, Cas. t. Talbot, 228.

(*b*) See *Doe v. Challis*, 7 H. L. C. 531 ; 29 L. J. Q. B. 121 ; 18 Q. B. 231. *Doe v. Fonnereau*, Dougl. 487 ; *Doe v. Howell*, 10 B. & C. 191.

(*c*) *Purefoy v. Rogers*, 2 Wms. Saund. 388 ; *Doe v. Morgan*, 3 T. R. 763, cited *ante*, p. 357 ; *Doe v. Owens*, 1 B. & Ad. 318 ; *Crofts v.*

Middleton, 8 D. M. & G. 192 ; 25 L. J. C. 513, "for it is well settled, (and, indeed, has been remarked as a rule without exception,) that when a devise is capable, according to the state of the objects at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise." 1 Jarman on Wills, 778 ; and see Fearn, C. R. 386, 395, 526. The same rule applies to future uses, see *ante*, p. 354.

(*d*) See *ante*, p. 325.

remoteness (a). So in the case of a devise to A. for life, with a devise over upon the failure of issue of A. indefinitely, A. takes an estate tail by implication, and the devise over is a remainder (b).

In accordance with this rule of construction, where a devise was made to A. and to the heirs of his body, and "if he die" then over, the devise over was read as "if he die without issue," and was construed to be a remainder expectant upon the estate tail (c).

As a will takes effect from the death of the testator it may happen that a devise, which in terms is a contingent remainder, by reason of events occurring in the lifetime of the testator since the date of the will, becomes in the result an executory devise.—Thus upon a devise to A for life with a devise over after his death to the children of B., the devise over is a contingent remainder whilst A. lives, and until B. has a child; but if A. die in the lifetime of the testator, and B. have no child at the death of the testator when the will takes effect, the devise is executory to his future children, as if originally limited to them without the preceding estate (d).

And conversely, "a limitation in a will which at the time of making it could only have operated by way of executory devise, may by change of circumstances in the testator's lifetime operate at his death so as to give a vested estate in possession, or a vested remainder, or a contingent remainder.—Also "a change of circumstances

(a) See *ante*, p. 181; *post*, p. 445.

(b) See *ante*, p. 325; as to what expressions in a will import an indefinite failure of issue, and the effect of the statute 1 Vict. c. 26, s. 29, in restricting such expressions, see *ante*, p. 182.

(c) *Spalding v. Spalding*, Cro. Car. 185; cited 1 Jarman on Wills, 427; Fearne, C. R. 420; see *Eastwood v. Lockwood*, L. R. 3 Eq.

487 36 L. J. C. 573, and cases there cited. As to a devise to A. and his heirs, and if he die or in case of his death, then over, see *post*, p. 368.

(d) *Hopkins v. Hopkins*, Cas. t. Talb. 44; 1 Atk. 581; see *Doe v. Roach*, 5 M. & S. 482; 3 T. R. 765, *per* Kenyon, C. J., in *Doe v. Morgan*; Fearne, C. R. 525; 1 Jarman on Wills, 788.

To A. in tail with devise over if he die.

Remainder or executory devise according to events at or after testator's death.

after the testator's death, may change the character of a particular limitation, and make it operate at one time as a remainder, at another as an executory devise; and *e converso* at one time as an executory devise, at another as a remainder" (a).

Devise construed in favour of vesting—words of futurity referred to time of possession, and not to the vesting.

Upon the general principle of construction in favour of vesting estates, words of futurity are referred to the time of possession rather than to the vesting in interest,—thus a devise to A. until B. shall attain twenty-one, and when B. attains that age, or *at* or *from* or *after* attaining that age to B. in fee, is construed as giving B an immediately vested estate subject to the term of years in A.; and not as an executory devise upon his attaining twenty-one, which would be the construction if the devise to him stood alone without the prior interest; and consequently if he die before attaining that age the fee descends to his heir (b).

So, a devise *after* payment of debts is not executory or future until the debts are paid, but gives an immediately vested interest, subject to a charge created for the amount of the debts (c).

(a) *Doe v. Howell*, 10 B. & C. 191, 199; and see *Fearne*, C. R. 506; 1 *Jarman on Wills*, 789. Land was devised to A. for life, with remainder to her son in fee, with a devise over, if he died before A., to such other child of A. as should be living at her death; it was held that the devise over was an executory devise during the son's life, but upon his death in A.'s lifetime became a contingent remainder, and failed by the subsequent destruction of A.'s life estate. *Doe v. Howell*, 10 B. & C. 191.

(b) *Boraston's Case*, 3 Co. 19; *Taylor v. Biddall*, 2 Mod. 289; *Doe v. Lea*, 3 T. R. 41; *Doe v. Ewart*, 7 A. & E. 636. See 1 *Jarman on Wills*, 733; "It is in effect a devise of the whole estate *instantly* to B. with the exception of a particular interest carved out for some

(no matter what) purpose." *Ib.* 735. *Hawkins on Wills*, 237. Whether the word "if" in the same context can be thus construed, see *Hawkins*, 239. See *per Best*, C. J. in *Duffield v. Duffield*, 1 Dow & Cl. 311, that all devises are to be holden to be vested, unless a condition precedent is so clearly expressed that the court cannot treat them as vested without deciding in direct opposition to the terms of the will.

(c) 1 *Jarman on Wills*, 743. Upon a devise in fee for payment of debts, with a devise over to another when the debts are paid, the devise over seems to be executory, at least as to the legal estate; and as to whether it may not infringe the rule against perpetuities, see *Lewis on Perpetuities*, c. xxx. *Bateman v. Hotchkiss*, 10 Beav. 426.

Upon the same general principle of construction, words of contingency are referred to the divesting of the estate rather than to the vesting, and are construed as conditions subsequent rather than precedent (*a*). Accordingly a devise to A. *if* or *when* he shall attain a given age, followed by a devise over in case he die under that age, is construed as giving an immediately vested estate, subject to be divested by the executory devise over taking effect; and not as an executory devise upon his attaining that age, which would be the necessary construction if it stood alone without the devise over. The devise over is considered as explaining the sense in which the estate is intended to be contingent,—that the devisee is to take in all events except the devise over taking effect (*b*).

Words of contingency referred to divesting rather than vesting the estate.

But this construction yields to other expressions in the will of an intention that the estate shall not be vested. And where the contingency enters into the description of the devisee, the devise may be necessarily contingent and executory; as if it be to *such* child or children of A. as shall attain twenty-one, or to the children *who* shall attain twenty-one, only such person or persons can take as eventually answer to the description (*c*).

An executory devise is construed strictly, relatively to the preceding estate, or against divesting it.—The following rules seem to be founded in great measure upon this

Constructions restricting contingency.

(*a*) See *ante*, p. 238.

(*b*) 1 Jarman on Wills, 738; Hawkins on Wills, 240; *Bromfield v. Crowder*, 1 B. & P. N. R. 313; *Edwards v. Hammond*, Ib. 324 n. *Phipps v. Ackers*, 9 Cl. & F. 583; see *Peck's Trusts*, L. R. 16 Eq. 221; 42 L. J. C. 422; *Spencer v. Wilson*, L. R. 16 Eq. 501; 42 L. J. C. 754, as to like gifts of personalty. And see *Edmondson's Estate*, L. R. 5 Eq. 389, where "not vested" was construed to mean only "subject to be divested."

(*c*) 1 Jarman on Wills, 741, 771; Hawkins on Wills. 241; *Festing v. Allen*, 12 M. & W. 279; see *Holmes v. Prescott*, 33 L. J. C. 264, cited *ante*, p. 357; *Best v. Donmall*, 40 L. J. C. 160; *Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. C. 316. *Price v. Hall*, L. R. 5 Eq. 399; 37 L. J. C. 191, a devise to the children of B., "if he leave any him surviving, but in case he leave no child him surviving" then over, held to be contingent to such children as survived.

Devise to A. in fee, and if he die, to B.

principle of construction. Upon a devise to A. in fee simple in possession, and "if he die" or "in case of his death" to B., the devise over is restricted to death in the lifetime of the testator, in order to satisfy the expression of contingency, and if A. survive the testator his estate is absolute (*a*).

To A. for life or in tail, and if he die, to B.

If the devise be to A. for life only, and if he die to B., the devise to B. is a vested remainder after the life estate of A., and is not restricted to the death of A. in the lifetime of the testator (*b*).—And if the devise be to A. in tail and "if he die" to B., the words "without issue" are supplied, and the devise to B. is a vested remainder expectant upon the estate tail (*c*).

To A. and if he die without leaving child.

If the event of death is coupled with an express contingency as "if A. die without leaving a child," no presumption is required to satisfy the contingent expression, and it would be an unnecessary restriction of the words of the will to construe the condition with reference only to the death of the testator; the devise over upon such contingency takes effect upon the death of A. without leaving a child, whenever that event may happen (*d*).

Devise to A. at future time or event, and if he die, to B.

If the devise to A. be limited to take effect at a future time or event, as if he shall attain a certain age, with a devise over in case of his death, or in case of his death without leaving children, or leaving children, or the like, the devise over is restricted to his death before the time

(*a*) 2 Jarman on Wills, 659; Hawkins on Wills, 254; *Edwards v. Edwards*, 15 Beav. 357; 21 L. J. C. 324. "As the testator speaks of death, the most certain of all things, as a contingency, it can only be made contingent by reference to its taking place before a particular period, and as no period of time is mentioned in the will, it is necessarily presumed that the period of time to which the testator refers is the period of possession, that is, his own death; and the subsequent limitation is introduced to prevent

a lapse in case A. did not survive the testator." *Per Romilly, M. R., Edwards v. Edwards*, supra.

(*b*) See *ante*, p. 339; a devise to A., without words of limitation, and in case of his death to B., before the Wills Act, had the same construction. See *ante*, p. 192. *Bowen v. Scowcroft*, 2 Y. & C. 640; *re More's Trusts*, 10 Hare, 171.

(*c*) See *ante*, p. 365.

(*d*) *Edwards v. Edwards*, supra; *Else v. Else*, 11 R. 13 Eq. 196; 41 L. J. C. 213.

or event specified for the devise to A. to take effect (a). Upon the same principle where a testator devised to such of his daughters as should attain twenty-one or marry, with a proviso that on the marriage of any daughter, a moiety of her share should be settled upon her and her children, the proviso was construed to apply only on marriage before twenty-one and on attaining twenty-one the shares vested absolutely (b).—So if the devise to A. be in remainder expectant upon a preceding estate for life or other particular estate, the devise over in case of his death, or in case of his death without leaving children or issue or the like, is restricted to such event happening before the determination of the preceding estate, after which the devise to A. would become absolute and indefeasible (c).

Upon the same principle of construction against divesting a prior vested estate, (applied especially in favour of provisions for children,) where a devise is made to children absolutely or without reference to surviving the parent, with a devise over upon the death of the parent “without leaving children,” the devise over is restricted to the case of death “without having had children,” in order that the estates limited to the children may not be divested (d).

Devise over upon death “without leaving children” restricted to without having children.

On the other hand, executory devises are sometimes

Constructions extending contingency.

(a) *Home v. Pillans*, 2 M. & K. 15; *Clark v. Henry*, L. R. 11 Eq. 222; 6 Ch. 588.

(b) *Re Dowling's Trusts*, L. R. 14 Eq. 463

(c) 2 Jarman on Wills, 693; *Edwards v. Edwards*, supra; *Heathcote's Trusts*, L. R. 9 Ch. 45; 43 L. J. C. 259; *Hill's Trusts*, L. R. 12 Eq. 302. “The principle which regulates such cases is to be found in the often expressed desire of the Court to avoid a case so inconvenient, as one which must suspend the absolute vesting during the whole life of the devisee.”

Edwards v. Edwards, supra. See 2 M. & K. 15, 21, *Home v. Pillans*. “The rules laid down in *Edwards v. Edwards*, as far back as the year 1852, and followed in other cases without any expression of dissent or doubt in any branch of the Court, are simple, intelligible, and very beneficial in the administration of estates.” *Heathcote's Trusts*, supra, per James, L. J.; See *Hill's Trusts*, supra, per Bacon, V. C.

(d) *White v. Hill*, L. R. 4 Eq. 265, and cases there cited; *Brown's Trusts*, 43 L. J. C. 84.

Devise over on death of children under 21 extended to case of no children.

extended to include events manifestly within the meaning though not within the expressions of the will as to the contingency upon which they are to take effect.—Thus, upon a devise to children with a devise over in case all such children should die under twenty-one, is extended impliedly to the case of there being no children (*a*).—So, a devise over in case of a prior devisee having but one child was held to extend to the case of not having any child (*b*).—But upon a devise over in case of the death of all of children under twenty-one, where there was a child at the date of the will who lived to attain twenty-one but died before the testator, it was held that the devise over must be taken according to the terms of the will and therefore never took effect (*c*).

Devise to children.

Upon the same principle of construction in favour of vested estates, a devise to the children of A. or to all the children of A., without any preceding estate or postponement of possession, *primâ facie* vests in the children living at the death of the testator only, to the exclusion of after-born children (*d*); only if there are no children in existence at the testator's death the devise is taken to be executory to all after-born children (*e*).—If the terms of the devise be to all the children "to be born," or "to be begotten," it extends *primâ facie* to after-born children (*f*). At the same time such words, and even the expression "hereafter to be born or begotten," do not exclude

To children "to be born," etc.

(*a*) *Meadows v. Parry*, 1 V. & B. 124; 2 Jarman on Wills, 703; *Mackinnon v. Sewell*, 5 Sim. 78. See *Doe v. Challis*, 18 Q. B. 231; 7 H. L. 531; 29 L. J. Q. B. 121.

(*b*) *Murray v. Jones*, 3 V. & B. 313.

(*c*) *Brookman v. Smith*, L. R. 6 Ex. 291; 7 Ib. 271; 41 L. J. Ex. 114. See *Tarbutck v. Tarbutck*, 4 L. J. C. 129; 2 Jarman on Wills, 709.

(*d*) 2 Jarman on Wills, 74;

Hawkins on Wills, 68; *Scott v. Harwood*, 5 Madd. 332.

(*e*) 2 Jarman on Wills, 84; Hawkins on Wills, 71. See *Harris v. Lloyd*, Turn. and Russ. 310.

(*f*) 2 Jarman on Wills, 98; Hawkins on Wills, 70; *Mogg v. Mogg*, 1 Mer. 654. But see *Storrs v. Benbow*, 2 M. & K. 46; *Butler v. Lowe*, 10 Sim. 317, as to personal estate, where the effect of such construction would be to postpone the distribution of the estate.

children born before the testator's death, or even before the date of the will (a).

A future devise to children, whether by way of remainder or executory devise includes all who are in existence at the period of possession ; as upon a devise to A. for life and after his decease to the children of A. or to the children of B., the children living at the death of the testator take vested estates subject to divesting *pro tanto* as others come into existence in the lifetime of A. (b). The rule extends to grandchildren, brothers, cousins, and other classes of relations, and the objects are finally ascertained at the period of possession or distribution ; but it does not apply to a devise to "relations" indefinitely, without restriction to a class (c).—If there are no children in existence at the period of possession, the devise extends to all after-born children, unless it must be taken as a legal contingent remainder, in which case it would fail upon the determination of the particular estate (d).—If the devise be subject merely to a term of years or to a charge it is considered as immediate, and therefore does not let in after-born children (e).

Upon the same principle a devise to A. and his children, *primâ facie*, vests in A. and the children existing at the death of the testator, if any, to the exclusion of after-born children (f).—If no children are then in existence, it is construed as an estate tail, in order that children may participate, according to the rule in *Wild's* case (g).—But the context of the will may require such a devise to be construed as giving a life estate to A. with remainder to his children (h).

(a) 2 Jarman on Wills, 101.

(b) See *ante*, p. 341. 2 Jarman on Wills, 75 ; Hawkins on Wills, 71. *Oppenheim v. Henry*, 10 Hare, 441.

(c) *Baldwin v. Rogers*, 3 D. M. & G. 649 ; 22 L. J. C. 665.

(d) See *ante*, p. 328 ; *Chapman v. Blisset*, Cus. t. Talb. 145.

(e) *Singleton v. Gilbert*, 1 Cox,

68 ; 1 Bro. C. C. 542.

(f) *Oates v. Jackson*, 2 Stra. 1172 ; 2 Jarman on Wills, 312.

(g) See *ante*, p. 187 ; Co. Lit. 9 a.

(h) *Crockett v. Crockett*, 2 Ph. 553 ; *Audsley v. Horn*, 29 L. J. C. 201 ; *Combe v. Hughes*, L. R. 14 Eq. 415 ; 41 L. J. C. 693. See *Newill v. Newill*, L. R. 7 Ch. 253 ;

Child in *ventre sa mère* capable of taking.

A child *in ventre sa mère*, who is afterwards born, is considered as existing for the purpose of taking by devise; and will take under a devise to children "born" or "living" at the death of the testator or of the parent, or at any other stated period (*a*).

Devise to illegitimate children.

A devise to children *primâ facie* means legitimate children; but it may appear from the express terms or the context of the will, or from the circumstances to which it is applied, to mean or to include illegitimate children, and persons answering to the description intended may take under it (*b*).

An illegitimate child cannot be designated by relation to the father, except as the reputed child, because no inquiry into the fact of paternity is legally admissible. The reputed relationship is a distinct matter of fact capable of being admitted by the father or otherwise established. Such child may be well designated by relation to the mother, and the maternity established by evidence. A gift by deed to future illegitimate children is, it seems, void as involving the illegal condition precedent of illicit cohabitation of the parents. So a devise to future illegitimate children of another person, at least as to such as are born after the death of the testator. But a devise to all the testator's illegitimate children or reputed children is good as to all persons answering such description at the death of the testator, though born after the date of the will (*c*).

41 L. J. C. 432, and the cases there cited and commented on; or the construction of the will may be to give a life estate to A. with a power of appointment amongst the children. *Curnick v. Tucker*, L. R. 17 Eq. 320, and cases there cited; *Sugden on Powers*, 105; and see *post*, p. 395.

(*a*) See *ante*, p. 329; 2 Jarman on Wills, 103; Hawkins on Wills, 79; *Doe v. Clarke*, 2 H. Bl. 399; *Trower v. Butts*, 1 S. & S. 181; *Storrs v. Benbow*, 3 D. M. & G.

390; 22 L. J. C. 823.

(*b*) *Pratt v. Mathew*, 8 D. M. & G. 522; 25 L. J. C. 409; *Hill v. Crook*, L. R. 6 H. L. 265; 42 L. J. C. 702; *Brown's Trusts*, 43 L. J. C. 84; L. R. 16 Eq. 239; *Dorin v. Dorin*, L. R. 17 Eq. 463; 43 L. J. C. 462.

(*c*) *Occleston v. Fullalove*, L. R. 9 C. 147; 43 L. J. C. 297, where the above positions seem to be established. *Re Goodwin's Trusts*, 43 L. J. C. 258; L. R. 17 Eq. 345. *Dorin v. Dorin*, *supra*.

SECTION IV. POWERS.

- § 1. Powers distinguished.
 - §§ 1. As to their source and operation.
 - 2. In connection with estates.
 - 3. As to the objects.
- § 2. Construction of powers as to the estates to be appointed and priority of operation.
- § 3. Execution of powers.
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- § 4. Equitable jurisdiction over powers.
 - §§ 1. Jurisdiction in aid of execution.
 - 2. Jurisdiction to set aside or control execution.

The extensive subject of powers is with difficulty compressed into the space here allotted ; but it is not the purpose of the present work to do more than digest the principal heads of the subject, which has been done in the order given above. Lord St. Leonards' work (*a*) is generally referred to throughout this section as sufficient authority for most of the propositions, without citing the cases and authorities by which his text is supported ; but the leading cases have been also given in many instances, and all the more recent decisions of importance have been cited or referred to.

(*a*) Sugden on Powers, eighth and last edition, 1861.

§ 1. POWERS DISTINGUISHED.

§§ 1. AS TO THEIR SOURCE AND OPERATION.

Power of appointing uses—power of revocation.

Uses appointed take effect as if inserted in the original instrument—uses appointed upon a use—uses appointed in remainder—application of the rule in *Shelley's* case—of the rule against perpetuities.

Uses vested in default of appointment.

Powers created by will—at common law and under the Statute of Uses.

Power to executors or trustees to sell—distinction between power and trust to sell—implied power in executors—statutory power in executors or trustees.

Powers to lease, sell, charge, etc.—powers operating upon the beneficial interests—powers operating upon the subject of property.

Powers of appointing uses.

Future uses may be completely declared as to the time of vesting, the event on which they are to arise, the persons to take and the estates to be taken, by the instrument raising the uses; or they may be reserved for future declaration, as to all or some of these particulars, by a person to whom authority is given by the instrument for that purpose, and who is then said to have a power of appointing the uses or *power of appointment* (a).

Power of revocation.

The power necessarily operates to displace or *revoke* the uses previously vested, whether declared in the instrument or resulting by operation of law; it is therefore sometimes called a power of *revocation and new appointment*, and is sometimes expressly created in that form. The revocation, however, is implied in the appointment, to

(a) See *ante*, p. 114; "This sort of power is a mode, which the owner of the estate reserves to himself, or gives to another person, through the

medium of the Statute of Uses, of raising and passing an estate." *Per* Eldon, L. C., 10 Ves. 266, *Maundrell v. Maundrell*,

the extent to which the appointment of new uses is authorised (*a*).

The uses appointed take effect, from the time of appointment, in the same manner and subject to the same rules, as uses expressly declared and limited in the instrument creating the power; and they may, for most purposes, be read as if inserted therein in place of the power (*b*).

Uses appointed take effect as if inserted in the original instrument.

Consequently, the uses appointed under a power will not be executed by the statute as legal estates, unless there be a seisin commensurate with such uses (*c*); nor if, when combined with the limitations in the deed, they appear to be uses limited upon a use; as where the conveyance is made to and to the use of A. to such uses as he or any other shall appoint; for in such case the uses appointed are beyond the operation of the statute, though they may be effectual as trusts in equity (*d*). So also if, under a power well created to appoint uses, the appointment be made to A. to the use of B., the statute executes the use in A., and the limitation to B. can only operate as a trust (*e*).

Uses appointed upon a use, not executed by the statute.

Uses appointed, if they take effect as remainders after a particular estate in the use declared in the original instrument, are subject to the rules concerning remainders, and if contingent are liable to fail by the determination of the particular estate before they become vested. —But the power of appointing uses after a particular estate, before any appointment is made, is not equivalent

Uses appointed as remainders.

(*a*) Butler's note to Co. Lit. 271 b, III. 4; 1 Sanders on Uses, 154; Sugden Powers, 200; Co. Lit. 237 a. A deed of appointment will be construed in law, first as a revocation and *cesser* of the ancient uses, and then a limitation or raising of the new. 1 Co. 174 b, *Digge's Case*. So a power of revocation reserved in a settlement to the settlor leaves him the power of appointing new

uses. Sugden, 371; see *post*, p. 414.

(*b*) 2 Sugden on Powers, 470; see *per* James, V. C., L. R. 10 Eq. 353; 39 L. J. C. 845, *re Brown's Settlement*.

(*c*) See *ante*, p. 118; Sugden, 149.

(*d*) See *ante*, p. 120; Sugden, 149.

(*e*) Sugden, 190, 457.

to a remainder in this respect, and it may subsist and be well executed notwithstanding the particular estate has determined. Thus where land was settled to the use of A. for life, with remainder to the children of A. as A. and B. jointly or as the survivor should appoint, and A. died, it was held that the power of appointment in B. the survivor was well created, and that the uses afterwards appointed under it were valid and operated as springing uses (a).

Rule in *Shelley's* case applied to appointed uses.

Limitations of the use in the original instrument and limitations appointed under a power contained in the same instrument may unite under the rule in *Shelley's* case, although, as a general rule, limitations contained in different instruments cannot unite under that rule. Thus, if land be limited to the use of A. for life, and after his death to such uses as B. shall appoint, and B. during A.'s life appoints to the heirs or to the heirs of the body of A., the limitation under the appointment is construed as if inserted in place of the power in the instrument creating it, and according to the rule in *Shelley's* case gives A. the inheritance in fee or in tail. So conversely, with a limitation to the heirs or heirs of the body in the original instrument and a limitation for life subsequently appointed under a power created by the same instrument (b).

Rule against perpetuities.

Also, the rule against perpetuities applies to the appointed uses, and the time for such uses to take effect is, in general, computed as if they had been inserted in the instrument creating the power (c).

Uses vested in default of appointment.

The uses of a conveyance may be expressly limited and declared in default of and until an appointment is made under a power given by the deed; and, if not expressly

(a) *Hole v. Escott*, 2 Keen, 444; 4 M. & Cr. 187; see *Doe v. Howell*, 10 B. & C. 191; *Wickham v. Wing*, 2 H. & M. 436; 34 L. J. C. 425; *Aylwin's Trusts*, L. R. 16 Eq. 585; 42 L. J. C. 745.

(b) See *ante*, p. 345; *Fearne*, C. R. 74; *Sugden*, 471; *Venables v. Morris*, 7 P. R. 342, 438; see *Doe v. Welford*, 12 A. & E. 61.

(c) As to the application of the rule to powers, see *post*, p. 458.

limited and declared, they will result to the grantor. The uses, whether expressly declared or resulting, are executed by the statute and become vested estates, but subject to be revoked and divested by the uses appointed under the power, which operate, when they arise, as shifting uses in substitution of the preceding estates (*a*).

Powers may be created by will in the form of a common law authority operating directly upon the legal estate to appoint and limit it; or in the form of a power to appoint uses of the legal estate to be executed by the Statute of Uses. The nature of the power in this respect depends upon the intention of the testator as shown by the terms of limitation employed in creating the power; and the appointment under the power must be framed and construed according to the form of the power (*b*). A power given by will to appoint the legal estate may be exercised by appointing such estate, thereby raising a seisin at common law, with a declaration of uses upon which the statute will operate, and thus the legal estate may be disposed of under the power with all the freedom of limitation allowed to uses (*c*).

Powers created by will,—operating at common law or under the Statute of Uses.

A common example of powers in wills occurs where executors or trustees are directed or authorised to sell real estate for various purposes, as for the payment of debts, legacies, etc. (*d*). Where such a power is given, without any estate in the land, it operates by way of executory devise in favour of the person to whom the land is sold; and the purchaser takes as devisee under the will and not by way of conveyance from the trustee or executor. The fee descends to the heir until the power is executed. But where the land itself is devised to the trustee or executor for the purpose of the sale the pur-

Powers to trustees or executors to sell.

Devise upon trust for sale.

(*a*) Fearn, C. R. 226, 232, adopted in Sugden, 452, 622; see *per* Eldon, L. C., 10 Ves. 265, *Maundrell v. Maundrell*.

(*b*) See *ante*, p. 122; Sugden, 45,

146, 196–199; see Butler's note to Co. Lit. 271 *b*, III. 5.

(*c*) Sugden, 197.

(*d*) See *ante*, pp. 259, 271.

chaser takes by conveyance from them (a).—This distinction is practically important with copyholds, for by giving a mere power of sale instead of devising the land, a purchaser takes directly under the will, and the admittance of the trustees for sale, together with the fine payable thereupon, is avoided (b).

Construction of wills as giving power or estate.

The distinction in the construction of wills appears to be this,—that a devise of *the land to executors* or others to sell passes the estate in the land to them for the purpose and upon trust for sale;—but a devise or direction *that the executors shall sell the land*, or *that the land shall be sold by the executors*, or even a devise of *the land to be sold by the executors*, gives them only a power and no estate (c).

Implied power in executor.

Where a testator has directed his real estate to be sold without declaring by whom the sale shall be made, if the proceeds be distributable by the executor, he will have the power by implication; and it will pass by right of representation to the executor of his executor (d).

Power by statute to raise charge for debts and legacies.

Where a testator has charged his real estate with the payment of debts and legacies, without making any express provision for raising the charge, a power to sell or mortgage for that purpose is given to the devisees in trust of the land, if there be such, and if not, to the executor, by the statute 22 & 23 Vict. c. 35, ss. 14–16, applying only to wills coming into operation after the passing of the Act, 13 August, 1859 (e).

(a) Lit. s. 169; Co. Lit. 112 b; 236 a; *Warneford v. Thompson*, 3 Ves. 513.

(b) Scriven on Cop. 349; see *Peppercorn v. Wayman*, 5 D. & Sm. 230; 21 L. J. C. 827.

(c) Sugden, 111–115, and authorities there cited and discussed; 2 Spence Eq. Jur. 366; Williams, Ex 549, 4th ed.; *Doe v. Shotton*, 8 A. & E. 905.

(d) Sugden, 115–118; 2 Spence, Eq. Jur. 367; see *ante*, p. 272.

(e) See *ante*, p. 271. — If a

joint power only is given to executors, all must join in selling at common law, and if one die the power can be no longer exercised. But by the statute 21 H. VIII. c. 4, if some refuse the administration, the rest may sell. A joint estate devised to trustees or executors upon trust to sell, vests in the survivor and the trust continues. As a general rule a power given to two or more persons by name is a *joint* power only and does not survive; but a power given to executors, trustees, or others as a

Powers are commonly given in terms expressing the effect of the execution of the power, as to lease, sell, charge, etc., and such mode of creating the power sufficiently expresses the intention; but the correct form of the power, according to its technical mode of operation is to authorise the revocation of the previous uses or estates and the declaration of new uses or estates to the extent and for the purposes intended. So also powers are frequently executed in the form of a lease or conveyance or devise, although the technical operation of the instrument is strictly by way of declaration of the uses or estates to be taken under the instrument creating the power (a).

Powers to lease, sell, etc., operate by appointment of estates.

The powers usually given in settlements of land may be referred to two kinds according to the purpose effected. The one kind operate only upon the beneficial interests of the settlement and are designed to modify the uses and estates primarily settled and to introduce new ones to meet the future requirements of the settlement, without affecting the subject of property. Such are powers to jointure a wife, to raise portions for children, and the like.—Other powers operate only upon the subject of property without affecting the beneficial interests. These operate either to convert the subject of property, wholly or in part, as occasion may require, as to convert land into money, or land into other land; such are powers of sale and exchange, powers of partition, powers to mortgage,

Powers operating upon the beneficial interests.

Powers operating upon the subject of property.

class without naming them survives and the last survivor may execute it. Co. Lit. 113 a, 181 b; Sugden, 126, 128; see *Townshend v. Wilson*, 1 B & Ald. 608; *Peppercorn v. Wayman*, 5 D. & Sm. 230; 21 L. J. C. 827; *Lane v. Debenham*, 11 Hare, 188. Hence Coke's advice to them that make such devises by will, to direct "that the sale be made by his executors or the survivors or survivor of them, or by such as take

upon them the probate of the will or the like."—"And it is better to give them an authority than an estate; unless his meaning be they should take the profits of his lands in the meantime; and then it is necessary that he deviseth that the mesne profits till the sale shall be assets in their hands, for otherwise they shall not be so." Co. Lit. 113 u.

(a) Sugden, 104, 837.

and the like :—Or they are subservient to the management of the property in its existing state, so as to render it available and productive for the benefit of all the persons interested ; such are powers of leasing, for agricultural or building purposes, powers of opening and leasing mines, and the like. These distinctions in the purposes effected will be found to have some practical consequences in the relative operation of the powers upon each other (*a*).

(*a*) “The powers of jointuring and charging for younger children’s portions are introduced with a view to benefit the immediate objects of the settlement by making a provision for those claiming under them as wives, or children. By the exercise of the power of leasing, or of selling and exchanging, the use is limited to a purchaser, who is not an immediate object of the settlement. The uses limited under the exercise of the former powers must be considered as limitations originally contained in the settlement for the benefit of the objects of it ; but the estates created by the latter must necessarily, as to the extent of such estates, overreach the limita-

tions of, and virtually supersede, the settlement itself.” 1 Sanders on Uses, 166 ; see *post*, p. 396.—As to what are usual powers to be inserted in settlements made under articles of agreement or executory trusts or under the direction of the Court, see Sugden, 150 ; 1 White & T. L. C. 33, 3rd ed, in notes to *Lord Glenorchy v. Bosville*.—Power is given by statute to the Court of Chancery to authorise leases and sales of settled estates upon certain conditions and with the consent of the parties interested, by 19 & 20 Vict. c. 120, amended by 21 & 22 Vict. c. 77, and 27 & 28 Vict. c. 45, and amended as to the consents required by 37 & 38 Vict. c. 33.

§§ 2. POWERS DISTINGUISHED IN CONNECTION WITH ESTATES.

Power co-existing with estate—conveyance of estate—execution of power—donee of power subsequently acquiring the fee.

Execution of power divests estate limited in default of appointment.

Power cannot be exercised in derogation of conveyance—conveyance with reservation of power—powers impliedly reserved—effect of a judgment upon the power.

Powers appendant.

Powers *collateral* or in gross—power simply collateral.

Powers both appendant and collateral.

A power may co-exist with an estate or interest in the land in the same person.—Thus if land be limited to such uses as A. shall appoint, and in default of and until appointment to the use of A. and his heirs, the use is executed in A. for an estate in fee simple, but subject to be divested by an exercise of the power (*a*).—If the conveyance be made in the form to A. and his heirs, to the use of A. and his heirs, with a power in A. to appoint new uses, A. takes at common law for his own use and not under the statute, nor can any further use be limited upon the use in A. within the operation of the statute; but the power will operate by the appointment of new uses in displacement and substitution of the use in A. and the new uses in favour of other persons will be executed by the statute (*b*).

Power co-existing with estate. Land settled as A. shall appoint, and in default of appointment to A. and his heirs.

To and to the use of A. and his heirs with power in A. to appoint new uses.

In such cases A. may convey or devise his estate in exercise of the power of disposition incident to the estate, and the purchaser will then take under his deed of conveyance or by his will;—or he may execute his power of appointment, and the purchaser or appointee

Conveyance of estate.

Execution of power.

(*a*) *Maundrell v. Maundrell*, 10 Ves. 246. (b) See *ante*, p. 119.

will then derive title through the appointment from the original instrument creating the power (a).

Deeds are often framed, for the sake of security, in a manner purporting to operate both ways, by conveyance and by appointment, leaving the question whether they operate in the one way or the other to be determined, if necessary, when the occasion arises. They will be construed as operating in that way which most effectually carries out the intention of the transaction (b).

Donee of power
subsequently
acquiring fee.

The fee and the power thus co-exist in the same person when originally so limited; but if the donee of the power subsequently acquire the fee simple, the power would, in general, cease according to the intention, as being no longer required for any purposes of its creation. — This frequently occurs under settlements where the land is limited to a tenant for life, with powers of sale, leasing, charging, etc., and with the ultimate remainder to him in fee; if the fee become executed in the tenant for life by the failure of the intermediate limitations between the life estate and the ultimate remainder, the powers can no longer be exercised, not on the ground that they are merged, but that according to the true construction of the settlement they were not intended to endure beyond the continuance of the limitations which they were intended to overreach (c).

An appointment of uses under the power operates upon

(a) Sugden, 93; *Clere's Case*, 6 Co. 17 b; *Maundrell v. Maundrell*, 7 Ves. 567; 10 Ib. 246.

(b) Sugden, 357; *Cox v. Chamberlain*, 4 Ves. 631; *Roach v. Wadham*, 6 East, 289. As to the correct mode of framing deeds of appointment and conveyance, see Sugden, 193.

(c) Sugden, 98, 859; *Cross v. Hudson*, 3 Bro. C. C. 30. "Both principle and authority establish that a power of sale and exchange in a settlement does not subsist after

the union of the life estate with the remainder in fee. Such a power can only subsist for the purpose of the settlement; and it would be difficult, in the absence of some express declaration by the parties themselves, to believe that they intended the power should subsist when it was no longer required by the limitations contained in the settlement." *Per Romilly, M. R., Wolley v. Jenkins*, 23 Beav. 53; 26 L. J. C. 379; see *Brown's Settlement*, L. R. 10 Eq. 349; 39 L. J. C. 845.

the estate limited in default of or subject to the appointment by divesting and superseding it, with all the charges and incidents affecting it at the time of its creation; as the claim of a wife to dower (a),—or a covenant to pay a rent charged upon the estate, which would run with the land as against a grantee of the estate (b).

Execution of power divests the estate and all original charges.

On the other hand, a conveyance or disposition of the estate, made in exercise of the right of ownership, whereby it is charged or alienated, removes it to that extent from the operation of the power of appointment; for the power cannot be exercised in derogation of a prior conveyance (c).—"The inability to derogate from a prior conveyance works what is usually called a suspension of a power. As, if land be granted to A. and his heirs, to such uses as B. shall appoint, and in the meantime to B. for his life or any greater estate, here B. has power to limit and appoint the uses of the fee; but if he makes a lease for years or for life before he executes that power, common justice requires that he should not derogate from his own grant by a subsequent appointment of the fee, and his power, therefore, is suspended as far as regards the lease and the interest of the lessee" (d).

Power cannot be exercised in derogation of conveyance.

Suspension of power.

But the power is not extinguished by the conveyance

(a) Sugden, 479; *Ray v. Pung*, 5 B. & Ald. 561; 5 Madd. 310.

(b) *Roach v. Wadham*, 6 East, 289. But the benefit of covenants made with the donee of the power and his appointees may run with the land in favour of the appointee. *Spoar v. Green*, 43 L. J. Ex. 57; L. R. 9 Ex. 105.

(c) Sugden, 51, 57, 74; 1 Sanders on Uses, 171.

(d) Opinion of the judges in *Long v. Rankin*, Sugd. Pow. App. 898. Lord St. Leonards describes the power under such circumstances as suspended or extinguished, according to the extent of the alienation of the estate, but the decisions show that it remains in force subject to

the rights of the grantee of the estate. Hence the following remark of the Court in the judgment in *Alexander v. Mills*, L. R. 6 Ch. 124; 40 L. J. C. 73: "The only thing really pressed on us against these decisions is that Lord St. Leonards, in successive editions of his work on Powers, has treated each case as limited to the circumstances of that case, and has declined to recognise them as establishing the broad principle that, so long as nothing is done in derogation of the alienor's estate, the alienation has no operation on the power. We cannot set this limitation on the part of this eminent author against the judicial decisions themselves."

of the estate, and except as against the grantee, whose interests only are protected, or with his consent, it may still be executed (a).—Accordingly, if land be limited to A. for life with remainders over, with remainder to A. in fee, and with a power in A. to revoke and appoint new uses in favour of particular objects; though a conveyance by A. of all his estate and interest would suspend the operation of the power against the grantee without his consent, as to the life estate and remainder in fee, yet as to the intermediate remainders, which are not affected by the conveyance, the power may still be executed. Thus upon the bankruptcy of A., which would transfer all his estate to the trustee in bankruptcy, the power would be so far suspended; but as to the estates limited to others, and not affected by the bankruptcy, the power would still be operative (b).

Conveyance with reservation of power.

A conveyance of the estate may be made with an express reservation of the power.—Where the tenant for life under a settlement containing powers of sale and conversion exercisable with his consent, conveyed his interest to a purchaser by the description of all his interest in the lands and funds into which the settled property then were or *at any time thereafter might be converted* and changed, it was held that the purchaser took the property subject to the powers of conversion, and that the subsequent consent of the tenant for life to a conversion was no derogation from his grant (c).

Implied reservation of power.

Where an estate subsists together with a power of leasing at a rent not less than the full value, a conveyance merely by way of mortgage or security for a charge, impliedly reserves the power to its full extent, because the power is not derogatory to the security, but auxiliary

(a) *Bringle v. Goodson*, 4 Bing. N. C. 726; *Alexander v. Mills*, L. R. 6. Ch. 124; 40 L. J. C. 73.

(b) *Badham v. Mee*, 7 Bing. 695; *Jones v. Winwood*, 3 M. & W. 653;

see *Hole v. Escott*, 2 Keen, 444; 4 M. & Cr. 187.

(c) *Warburton v. Farn*, 16 Sim. 625.

to it (a). Where the tenant for life under a settlement, having a power to renew leases and take the fines on renewal for his own benefit, assigned all his interest under the settlement by way of mortgage; it was held that the power might be exercised notwithstanding the mortgage, but that the consent of the mortgagee was necessary, for he being assignee of the fines had an interest in every renewal which might be granted (b).

A judgment, as formerly charging the land, was considered to do so not by act of the party, but in *invitum*, and therefore did not affect the power and was liable to be defeated by an execution of the power (c). The statute 1 & 2 Vict. c. 110, s. 13, made the judgment an actual charge on the property over which the debtor has any disposing power for his own benefit, as if he had actually charged it.—But the recent Act, 27 & 28 Vict. c. 112, has deprived a judgment of any effect as a charge until the land is actually delivered in execution.—By the former Act, s. 11, all lands over which the judgment debtor, at the time of entering up judgment or at any time afterwards, has any disposing power which he might, without the assent of any other person, exercise for his own benefit, may be taken in execution.

Effect of a judgment against the donee of a power.

Powers have been distinguished and designated according to their operation upon the estate of the donee, and their consequent dependance for their full efficacy upon the continuance of that estate, as follows :—

“Powers *appendant* or *appurtenant* are so termed be-

(a) Sugden, 58; *Long v. Rankin*, Sugd. Pow. App.

(b) *Simpson v. Bathurst*, L. R. 5 Ch. 193. Hatherley, L. C., there said, “The simple fact of a mortgage does not extinguish a power of this nature, although, of course, the donee of a power can in no case defeat his own instrument. So that the true question in such cases is not whether the power is good, but

whether the donee by exercising it is or not interfering, or attempting to interfere, with any other rights which he has created. If he cannot exercise the power without derogating from such rights he cannot exercise it at all, but if he can do so in harmony with such rights he is at liberty to do so.”

(c) Sugden, 480. See further as to judgments, *post*, Part IV.

Powers appen-
dant to estate.

cause they strictly depend upon the estate limited to the person to whom they are given." They are restricted by any alienation or disposition of that estate inconsistent with a subsequent exercise of the power; for the power cannot be afterwards exercised in derogation of such alienation. As where an estate is limited to the use of a person in fee, with a power of revocation and new appointment;—or where an estate for life is limited to a person with a power to grant leases in possession;—in either case an alienation of the estate restricts the power to the extent of the alienation, and the power is so far appendant or appurtenant to the estate (*a*).—Powers appendant may also be extinguished by release (*b*).

Powers collateral
or in gross.

Powers which do not operate upon an estate limited to the person to whom they are given, are called collateral or in gross. They include powers given to a person to whom an estate is limited, but which enable him to create such estates only as do not operate upon his own estate; also powers given to a person having no estate.—Instances of the former kind occur in the case of a tenant for life, with a power of appointing a jointure to his widow, which cannot operate until after the determination of his life estate;—and in the case of a tenant for life with a power of appointing after his death to his children.—Such powers in tenant for life are not, like powers appendant, affected by a conveyance of his life estate; because they do not operate in derogation of the conveyance. But they may be released and extinguished by him (*c*).

In person having
estate.

(*a*) Sugden, 46, 51, 57; see *Alexander v. Mills*, L. R. 6 Ch. 124; 40 L. J. C. 73. "A leasing power given to a tenant for life is usually spoken of in our books as a power appendant to the estate of the tenant for life; and it is said that the estate of the lessee is in such case derived out of the estate of the tenant for life for such period of the term as he

may happen to live. It would probably be more correct to say that it operates upon that estate, than to say it is derived out of it even during that period." Opinion of the Judges in *Long v. Rankin*, Sugden, 899.

(*b*) Sugden, 82.

(*c*) Sugden, 46, 79, 82; "Every grantee for life with a power in gross may release or extinguish it." *West*

Powers in gross in a person having no estate in the land are distinguished into those which the donee of the power may exercise for his own benefit,—and those which he can exercise for the benefit of others only, without any benefit to himself. The former partake of the nature of property or interest, and may therefore be released or extinguished by the donee of the power.—An instance of this kind of power occurs where a person seised in fee settles his whole estate upon others, but reserves to himself a power of revocation. Such power is a power in gross and part of his old dominion; by revocation of the uses he would be restored to his former ownership; and it is therefore capable of being released and extinguished (a).—So if the power of revocation be reserved to the heir of the settlor, because by the revocation the heir would be restored to the estate (b).

In person having no estate.

Power reserved upon settlement of estate.

A power in a person having no estate or interest in the land which he can exercise for the benefit of others only, and not of himself, is called a power *simply collateral*. As for example, a power given to a stranger to revoke a settlement and appoint new uses to other persons designated in the deed. Also powers given to executors to sell land for the purpose of the will, and powers given to trustees of settlements to sell, lease, etc. are examples of powers *simply collateral* (c).—Powers of this kind give a bare authority without any property or interest, and are therefore not capable of being released or extinguished by the donee of the power; but only by those persons for whose benefit they are created (d).

Power simply collateral.

It may be observed that “a power in gross, and a power collateral (not *simply collateral*) is one and the same thing;” though the word collateral has been sometimes

v. *Berney*, 1 Russ. & M. 431; Sugden, 88; *Bickley v. Guest*, 1 Russ. & M. 440.

(a) Sugden, 47, 82; Co. Lit. 237 a; 265 b; *Albany's Case*, 1 Co. 110 b.

(b) *Grange v. Tiving*, Bridgm. 114.

(c) Sugden, 47.

(d) Sugden, 47, 49; Co. Lit. 237 a 265 b; *Digge's Case*, Moor, 605.

used as meaning *simply* collateral in distinction to powers in gross (a).—“ This classification of powers is important only with reference to the ability of the donee to suspend, extinguish, or merge the power ” (b).

Power appendant as to some estates and collateral as to others.

The same power may have different aspects and may be both appendant and collateral with reference to different estates of the donee upon which it operates ; as, if a settlement be made to A. for life with remainder to B. for life or in tail, with remainder to A. in fee, and A. be given a power to jointure his wife or to appoint to his children after his death, the power is collateral or in gross as to his life estate, but appendant or appurtenant as to his remainder in fee. And if he conveyed the fee, he would remove it from the operation of the power ; but the power would remain operative over the intermediate remainder after the death of A. (c).

(a) Sugden, 906.

(b) Sugden, 49.

(c) Sugden, 47, 87 ; see *ante*, p. 384.

§§ 3. POWERS DISTINGUISHED, AS TO THE OBJECTS OF THE POWER.

General and particular powers.

Powers of appointment to a class—Distributive and exclusive powers—power of selection from class.

Power to appoint to children—to children living at death of parent—child *in ventre sa mère*—power to appoint to “relations.”

Implied gift to children in default of appointment—gift to children with power to apportion shares.

Powers are also distinguished, in regard to the objects of the power, into *general* and *particular* or *special* powers.—A general power authorises an appointment to any person ;—a particular or special power restricts the appointment to some person or persons, or class of persons specified in the creation of the power (a).—“A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases ; he has an absolute disposing power over the estate.” This distinction of general and particular powers has some important consequences in the execution of powers (b).

Powers distinguished as to the object,—general and particular powers.

A power of appointment to a class of objects, as children, may be *distributive* amongst all the individuals of the class, also called a *non-exclusive* power ; or *exclusive*, authorising a selection of one or more to the exclusion of the rest, according to the terms of the power.—A power given in the terms, “to all and every the children,” or “to and amongst” or “amongst” the children, or “in

Power of appointment to class of objects.

Distributive and exclusive power.

(a) Sugden, 394 ; Butler’s note to Co. Lit. 271 b, III. 4. (b) Ib. ; see *post*, p. 407, 416.

such shares" as A. shall appoint, requires that all shall have a share; the power is distributive only and not exclusive.—A power in the terms, "to such," or "to and amongst such" or "to one or more" of the children, as A. shall appoint, imports the power of appointing to some exclusively; the power is distributive and exclusive (a).—A power in the terms, "to one" of the children, as A. shall appoint, gives the power of selecting one; it is exclusive only and not distributive (b).

Power of selection.

Power to appoint to children, etc.

A power to appoint to children does not extend to grandchildren; although the power be expressed to be to the children "for such estate and subject to such provisions and limitations as the donee of the power may direct, limit, or appoint." And under such a power an appointment to a child for life with remainder to his children in strict settlement would not be authorised except as to the appointment to the child, and beyond that would be void (c). But a deed of appointment in this form to which the child is an executing party, may be supported in some cases as operating first as a good appointment to the child, enabling him to make the settlement intended, and then as a settlement by him (d).

To children living at death of parent.

The power of appointment to children may be restricted in its terms to the children living at the death of the parent or some other time, although it be exerciseable by deed or will, and in such case those children only who survive are objects of the power (e).

A child *in ventre sa mère*, who is afterwards born, is

(a) Sugden, 444, and cases there cited; *Gainsford v. Dunn*, L. R. 17 Eq. 405; 43 L. J. C. 403. As to an illusory execution of a non-exclusive power, see *post*, p. 435, where see also the statute, 37 & 38 Vict. c. 37.

(b) *Brown v. Higgs*, 4 Ves. 708, 717.

(c) Sugden, 664; *Doe v. Welford*, 12 A. & E. 61; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; see *Trollope v. Routledge*, 1 D. & Sm. 662.

A devise to the children of A. and their heirs, for such estates as A. should appoint was held to authorise an appointment to a grandchild. *Fowler v. Cohen*, 21 Beav. 360.

(d) Sugden, 670; see *post*, p. 420.

(e) Sugden, 674, as to the construction of powers in this respect; and see *Kennedy v. Kingston*, 2 J. & W. 431; *Bielefield v. Record*, 2 Sim. 354; *Swift v. Swift*, 8 Sim. 168,

considered as existing for the purpose of taking by appointment under a power to appoint amongst children living at the death of the father (a). Child in ventre sa mère capable of taking.

A power to appoint amongst "relations" is, in general, construed to mean those capable of taking under the statute of distributions, even in the case of a devise of real estate (b). Power to appoint to relations.

Where a power of appointment amongst children is given by will, whether exclusive or non-exclusive, without any express gift to the children or others in default of appointment, there is in general implied a gift to the children in that event (c). But under such implied gift those children only can take in default of appointment who were capable of taking by appointment. So that if the power be restricted to children living at the death of the parent, (as where it is exerciseable by will only,) the surviving children only take in default of appointment, and those dying in the lifetime of the parent are excluded (d).—A power to appoint to one only of children to be selected exclusively of the others would not raise such implication in favour of all the children or of any of them (e). Implied gift to children in default of appointment.

But where there is a gift to children with a power of appropriating the shares in which they are to take,—as, to all the children of A. in such shares as A. should appoint by will,—the children take vested interests by the express terms of the gift, subject to be divested by the exercise of the power, and a child dying in the lifetime Gift to children with power to apportion shares.

(a) *Beale v. Beale*, 1 P. Wms. 244; Sugden, 673; *ante*, pp. 329, 372.

(b) *Doe v. Over*, 1 Taunt. 263; Sugden, 653, 657; Hawkins on Wills, 104.

(c) Sugden, 591; 1 Jarman on Wills, 485; *Brown v. Higgs*, 8 Ves. 574; *Butler v. Gray*, L. R. 5 Ch. 26; 39 L. J. C. 291; *Jefferys' Trusts*, L. R. 14 Eq. 136; 42 L. J.

C. 17; where a gift over in default of appointment was construed as meaning in default of children in order to admit the implied gift to the children.

(d) Sugden, 595; *Walsh v. Wallinger*, 2 Russ. & M. 78; *Kennedy v. Kingston*, 2 J. & W. 431; see *Phene's Trusts*, L. R. 5 Eq. 346.

(e) Sugden, 593; see *ante*, p. 390.

of the parent will remain entitled in default of appointment, notwithstanding the power, being by will only, is restricted to those living at the death of the parent (a).

Where by a settlement a sum of money was charged for the younger children to be paid in such shares as the father should appoint and in default of appointment equally, and the father appointed a certain sum to one of the children, it was held the unappointed portion must be equally divided amongst all the children including that one to whom the appointment had been made (b).

(a) Sugden, 597; *Casterton v. Sutherland*, 9 Ves. 445; *Lambert v. Thwaites*, L. R. 2 Eq. 151; 35 L. J. C. 406, and see the cases there cited and commented on. "The general principle seems to be this,—if the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A. to give it, as he may think fit, among

the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it." *Per Kindersley, V. C., Lambert v. Thwaites*, *supra*.

(b) *Walmsley v. Vaughan*, 1 D. & J. 114; 26 L. J. C. 503; and see *Simpson's Settlement*, 4 D. & S. 521; 20 L. J. C. 415, where "in default of appointment" was construed to mean so far as an appointment should not extend.

§ 2. CONSTRUCTION OF POWERS.

Construction of Powers as to the Uses and Estates to be appointed.

Power in general terms extends to fee—power to appoint fee includes less estates—appointment of a charge—of a sale and conversion.

Devise of absolute power of disposition passes the fee—disposition restricted as to the objects—devise for life with power over remainder.

Construction of powers as to priority of operation.

The power does not, in general, limit the uses and estates to be appointed, but only gives authority to appoint them. Therefore technical words of limitation are not required, even in a deed; and the extent of the authority, as regards the uses and estates to be appointed depends upon the intention of the power, collected from the terms and purpose of its creation (a).

Construction of powers as to uses and estates to be appointed.

A power to sell or appoint or dispose of land in general terms, without any express or implied restriction of the estates to be created, extends to the fee; it imports the same power of disposition as the donor of the power himself had (b).—So a power to appoint or dispose of land to a particular object or objects, without words of limitation, authorises an appointment in fee (c).

Power in general terms extends to the fee without words of limitation.

A power to appoint the fee simple or to appoint in general terms, without restriction as to the nature or quality of the estate or interest to be appointed, also authorises an appointment of any less estate or interest derivable out of the fee (d).

Power to appoint fee includes lesser estate.

(a) Sugden, 102, 393.

(b) Sugden, 398; *Wood v. Richardson*, 4 Beav. 174.

(c) Sugden, 400; *Liefe v. Salt- ingstone*, 1 Mod. 189; 1 Freem.

176. See *R v. Stafford*, 7 East, 521.

(d) Sugden, 408, 412, 837. *Crozier v. Crozier*, 3 Dru. & War., 353.

Appointment of charge.

A power extending to the fee may be well executed by appointing a charge upon the land in favour of an object of the power, giving an equitable interest only, whether with or without a legal term or interest as auxiliary to it (a);—or by appointing that the land shall be sold and the proceeds distributed amongst the objects of the power (b).—So a power of appointment over real estate, unrestricted as to the estates or interests to be appointed, may be well executed by appointing a share to an object of the power and declaring that it shall be of the nature of personal estate; and the interest in such share will be transmissible accordingly (c).—In such cases, though the appointment may not be formally valid at law, as where it is made to trustees for sale, (such trustees not being objects of the power,) it is valid in equity and will be carried into effect (d).

Of sale and conversion.

Devise of absolute power of disposition passes the fee.

A devise to a person in terms importing that he may dispose of the property at his absolute discretion confers an estate in fee simple or the entire interest, and not merely a power; but this construction does not apply to a conveyance by deed, in which such form of limitation would merely confer a power of appointment (e).

(a) *Roberts v. Dixall*, 2 Eq. Ca. Alr. 668; Sugden, 405.

(b) *Long v. Long*, 5 Ves. 445, where the power in terms extended to charging only, but to an unlimited extent. *Kenworthy v. Bate*, 6 Ves. 793; *Fowler v. Cohen*, 21 Beav. 360; *Cowx v. Foster*, 1 J. & H. 30; 29 L. J. C. 886.

(c) *Webb v. Sadler*, L. R. 8 Ch. 419; 42 L. J. C. 498.

(d) Sugden, 406.

(e) Sugden, 104; see *ante*, p. 165; *re Maxwell's Will*, 24 Beav. 246; 26 L. J. C. 854. As to a devise to executors or trustees passing the fee or a power to sell only, see *ante*, p. 378; Sugden, 111. "Technical words are so essential to the creation of estates by deed, and their import

is so generally understood, that a question rarely arises upon a deed, whether a party take an actual estate or only a power." Sugden, 134. "There is an evident difference between a power and an absolute right of property; not so much with regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason why the money he has a right to raise should not be considered his property, as much as a debt he has a right to recover. But the latter can only be charged in the manner and to the extent specified at the creation of the power." *Per Grant*, M. R., *Holmes v. Coghill*, 7 Ves. 505.

Where the devise is accompanied with expressions restricting the disposition to particular objects, the question often arises whether such expressions are obligatory and create a particular power only in favour of the objects mentioned.—Where a testator devised to his wife “to be at her disposal in any way she may think best for the benefit of herself and family,” it was held that the property was left to her absolute disposal, and that no trust or restriction was imposed in favour of the family (*a*).—Where a testator devised all his property to his wife, her heirs, executors, administrators, and assigns, for her sole use and benefit, in full confidence that she would dispose of it for the benefit of all their children, it was held that a trust was created and that the wife took an estate for life with a power of appointment amongst the children (*b*).

Disposition restricted as to the objects.

A devise to a person for life expressly, with remainder to such persons as he shall by deed or will or otherwise appoint, does not give him the absolute interest; although he may acquire it by an exercise of the power (*c*).—So, a devise to a person for life, with remainder to his “assigns” gives him a life estate with a general power of appointment over the remainder (*d*).

Devise for life with power over remainder.

Where several powers are given or reserved by the

(*a*) *Lambe v. Eames*, L. R. 6 Ch. 597; 40 L. J. C. 447; and see *Mac-kett v. Mackett*, L. R. 14 Eq. 49; 41 L. J. C. 704; *Brook v. Brook*, 3 Sm. & Gif. 280.

(*b*) *Wace v. Mallard*, 21 L. J. C. 355. *Curnick v. Tucker*, L. R. 17 Eq. 320. In this class of cases it is sometimes doubtful whether the devisee takes an estate in fee upon trust or an estate for life with a power to dispose of the inheritance. “The better opinion certainly is that the devise is for life, with a power to appoint the inheritance, unless the words of the will clearly negative such a construction, and the authorities appear to be greatly in

favour of that opinion.” Sugden, 105, 106. As to precatory expressions in a will being construed to be obligatory, see *ante*, p. 132.

(*c*) Sugden, 105; and the same rule applies to personal estate, *Ib*. See *Tomlinson v. Dighton*, 1 P. Wms. 149; 10 Mod. 31; *Powell's Trusts*, 39 L. J. C. 188; *Pennock v. Pennock*, L. R. 13 Eq. 144; 41 L. J. C. 141. See *Butler v. Gray*, L. R. 5 Ch. Ap. 26; 39 L. J. C. 291; *Farington v. Parker*, L. R. 4 Eq. 116, a case of chattels personal.

(*d*) *Quested v. Michell*, 24 L. J. C. 722; see *Brookman v. Smith*, L. R. 6 Ex. 291; 7 *Ib*. 271; 40 L. J. C. 161.

Construction of powers as to priority of operation. same deed or instrument, which cannot operate concurrently, the question occurs as to the priority of their operation. This may be expressly provided for in the terms of the instrument; but the usual practice seems to be to leave it to be determined by construction of law from the purpose and intention of the powers and the occasions for their exercise (*a*).

Power of sale. A power of sale and exchange necessarily operates by its exercise a complete conversion of the subject of property and, in general, supersedes all the then existing uses, estates, and powers under the settlement, (except a lease previously created under a power of leasing,) and transfers them, so far as they apply, to the property purchased or taken in exchange (*b*).—Similarly, a power of partition shifts all the uses from the undivided moiety to the specific separate moiety acquired by the partition (*c*).—So, a power to raise money for payment of debts or legacies, in general, takes priority of all beneficial estates and interests in the property (*d*).

Power of leasing. A power of leasing, the purpose of which is the profitable disposal of the property for the time being in the interest of all persons beneficially entitled under the settlement, necessarily operates in priority to all other powers then subsisting. The execution of a lease under the power effectually displaces the possession during the term thereby created and vests it in the lessee, as against all the estates in the settlement, which it renders reversionary in regard to the lease; and all other powers subsequently executed operate only upon the reversion (*e*).—The benefit of the rents, covenants, conditions and rights of entry under the lease, provided it be made in accordance with the power, becomes incident to the

(*a*) Sugden, 488; 1 Sanders on Uses, 164; Butler's note to Co. Lit. 271 *b*, III. 4.

(*b*) Sugden, 482; see *ante*, p. 379.

(*c*) Sugden, 483; *Earl of Uxbridge v. Bayley*, 4 Bro. C. C. 13;

1 Ves. jun. 499.

(*d*) See *Bringloe v. Goodson*, 4 Bing. N. C. 726.

(*e*) Sugden, 483; *Bringloe v. Goodson*, 4 Bing. N. C. 726.

reversionary estates and interests under the settlement in their order of succession (a).

A power of jointuring, according to its purpose, operates from the death of the husband, and takes priority of all other beneficial uses and estates of the settlement then subsisting or arising upon that event (b). Power of jointuring.

A power of charging portions for children, in general, takes effect after the life estate of the father, and subject to the jointure of his widow (c). Power of charging portions.

(a) *Whitlock's Case*, 8 Co. 69 b; Butler's note to Co. Lit. 214 a; *Isherwood v. Oldknow*, 3 M. & S. 382; *Rogers v. Humphreys*, 4 A. & E. 299. In *Whitlock's Case* it was resolved, as to the form of reservation in a lease under a power, that "when the lessor reserves rent to him and his heirs, it is good, for that by construction of law precedes the limitations of the uses, and then it being well reserved, it is well transferred to every one to whom any use is limited. So if the reservation be to the lessor and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good, for the law will distribute it to every one to whom any limitation of the use shall be made. But it was agreed that the most clear and sure way was to reserve rent yearly during the term, and leave the law

to make the distribution, without an express reservation to any person." 8 Co. 71 a. Where the lessor having a power of leasing under a settlement made a lease reserving the rent to himself, his heirs and assigns, without any reference to the power whereby the reservation might be explained and directed, it was held that the lease operated only by way of estoppel between the parties to it, and was void both for and against the persons entitled under the settlement. *Yellowly v. Gower*, 11 Ex. 274; 24 L. J. Ex. 289, explaining *Greenaway v. Hart*, 14 C. B. 340; 23 L. J. C. P. 115, in which case a lease made in like terms but with express reference to the power was supported in accordance with the apparent intention.

(b) Sugden, 484.

(c) Sugden, 487.

§ 3. EXECUTION OF POWERS. §§ 1. TIME OF EXECUTION.

Power may be executed at any time during the life of the donee—
notwithstanding the determination of his estate.

Power given at a future time or event—after decease—when in
possession of estate.

Power given upon contingency—power given to survivor of two
or more persons.

Power restricted to certain time or event—during coverture—
powers in settlements.

Power given for
life.

Notwithstanding
determination of
his estate and
vesting of re-
mainder.

A power given in general terms, without express or implied restriction of the time of execution, may be exercised at any time during the life of the donee (a). And where the donee of the power takes an estate determinable during his life, the power may continue and be exercised, though the estate be determined and the remainder vested in possession until appointment. Thus where real estate was settled upon A. for life or until bankruptcy, with remainder to his children as he should appoint, and in default of appointment to the children equally; upon his bankruptcy the property vested in possession in the children, but was subject to a subsequent execution of the power (b).—Where the donee of the power took such a determinable estate, and it was expressly provided that upon the determination of his estate in the event specified the property should go over as if he were actually dead, it was held that his power ceased upon the determination of his estate (c).

(a) Sugden, 260.

(b) *Aylwin's Trusts*, L. R. 16 Eq. 585; 42 L. J. C. 745; *Wickham v. Wing*, 2 H. & M. 436; 34 L. J. C. 425, explaining *Haswell v. Haswell*, 2 D. F. & J. 456; 30 L. J. C.

97, as relating to personalty to be paid over upon the determination of the estate.

(c) *Potts v. Britton*, L. R. 11 Eq. 433.

A power given at a future time or in a future event cannot be executed until the time arrives or the event happens. Thus, a power of sale given *after the decease* of a person cannot, in general, be exercised during his life (a).—So, where in a settlement a power of leasing was given to the father tenant for life during his life, and after his decease to the son tenant for life during his life ; it was held that the son could not lease under the power during the lifetime of the father, although the father conveyed his estate to the son (b).

Power given at future time.

After decease of a person.

But a power given to appoint uses or estates after the decease of a tenant for life may require to be construed relatively to the prior life estate, as applying to the time of possession of the estate to be appointed and not as limiting the time for executing the power (c).—A limitation to A. for life and ‘after his death’ as he shall appoint does not restrict the execution of the power to a will, but it may be made at any time during his life. On the other hand, a devise to A. for life and afterwards to *leave* it or *will* it to whom he pleases was construed to give a power of appointment by will only (d). So a devise to testator’s wife for life and *at her decease* to dispose of the property amongst his children at her discretion was held to give a power by will only, and therefore in favour of such children only as survived her (e).

Power given to tenant for life after his decease.

A power given to the tenant of an estate to be executed when in actual possession of the estate cannot be executed before he obtains possession ; and, in general, possession of his own estate is intended, so that the power cannot be

Power given when in possession.

(a) Sugden, 266 ; Co. Lit. 112 b ; *Blacklow v. Laws*, 2 Hare, 40. *Johnstone v. Baber*, 8 Beav. 233 ; *Want v. Stallibrass*, L. R. 8 Ex. 175, 42 L. J. Ex. 108, and cases there cited.

(b) *Coxe v. Day*, 13 East, 118.

(c) Hargrave’s note (2) to Co. Lit. 113 a. *Alexander v. Young*, 6 Hare, 393, where the power was given to the tenant for life with a

direction that any appointment by deed should not “come into operation until after her death,” and it was held not to prevent the execution of the power by an irrevocable deed.

(d) Sugden, 210.

(e) *Freeland v. Pearson*, L. R. 3 Eq. 658 ; 36 L. J. C. 374, and see the cases there cited.

accelerated by possession acquired under a grant of a prior possessory estate (*a*).

But in the above cases of a power to arise at a future time or event, a covenant or contract to execute the power when it arises, may sometimes operate as a good execution and be enforced in equity (*b*).

Power given
upon a contin-
gency.

A power given upon a contingency seems to depend upon the nature of the contingency, as to whether it can be exercised before the contingency happens. A power given to a person in case of failure of issue at his death may be executed during his life, though operative only upon the contingency happening of his death without leaving issue (*c*).

Power to sur-
vivor of two
persons.

If the contingency is as to the person, it cannot be executed until the person is ascertained. Thus, a power given to the survivor of two persons cannot be executed by a joint appointment, or by a several appointment during their joint lives. But, if to be executed by will, it may be well executed by the will of the actual survivor, though made during the joint lives; for the will, now at least, speaks from the death (*d*).

Power restricted
to certain period
or event

A power to be exercised within a prescribed period is not well executed by a will, unless the donee of the power die within the period, because the will is not operative until his death (*e*). And where the power was limited to cease in a certain event, *as if the donee were*

(*a*) Sugden, 269, see *Coxe v. Day*, 13 East, 118.

(*b*) See *post*, p. 425; 1 Sch. and Lef. 63, *Shannon v. Bradstreet*; *Affleck v. Affleck*, 3 Sm. & Giff. 394; 26 L. J. C. 358; *Johnson v. Touchet*, 37 L. J. C. 25.

(*c*) Sugden, 263. *Dalby v. Pullen*, 2 Bing. 144. And as to a power to arise on default of issue, see Sugden, 267.

(*d*) Sugden, 124, 263; 1 Vict. c.

26, s. 24; and a general devise operates as a general power of appointment, s. 27. See *M'Adam v. Logan*, 3 Bro. C. C. 310; *Doe v. Tomkinson*, 2 M. & S. 165; *Hole v. Escott*, 4 M. & Cr. 187. As to a power given to A. in case he survive B., see Sugden, 262.

(*e*) *Cooper v. Martin*, L. R. 3 Ch. Ap. 47, and there is no jurisdiction in equity to supply such defect in the execution. *Ib.* see *post*, 423.

then dead, a will previously made was held to be no execution, as the will remained revocable (a).

A power given to a married woman during coverture cannot be exercised after the death of her husband; a power given "notwithstanding coverture" is not restricted to the coverture (b).—So a power given to a woman "being sole" cannot be exercised after marriage; but such restriction will not be implied upon a general power given in a settlement made before marriage, though the settlement contain limitations and other particular powers to take effect upon the marriage (c).

The usual powers in a settlement are impliedly restricted in their execution by the duration of the settlement, or the continuance of the trusts and purposes to which the powers are subservient; and they cannot, in general, be exercised after the vesting in possession of the ultimate remainder in fee, whereby they are rendered no longer necessary (d).

(a) *Potts v. Britton*, L. R. 11 Eq. 433.

(b) *Doe v. Bird*, 2 Nev. & M. 679; 5 B. & Ad. 695. Sugden, 155, 264. *Holliday v. Overton*, 14 Beav. 467. A power given in a marriage settlement "during coverture" will not extend to a second

marriage. *Horsman v. Abbey*, 1 J. & W. 381; *Morris v. Howes*, 4 Hare, 599.

(c) Sugden 155; *Wood v. Wood*, L. R. 10 Eq. 220; 39 L. J. C. 790.

(d) Sugden, 99, 859; see *ante*, p. 382.

§§ 2. THE FORM AND CONDITIONS OF EXECUTION.

Forms and conditions prescribed by the power must be strictly complied with.

Power given in general terms.

Power to be executed by deed—by other instrument or writing—will operating as instrument of execution—statutory form of execution by deed.

Power to be executed by will—statutory form of execution by will—execution by will revocable.

Consent required to execution.

Power involving discretion cannot be transferred—power extended to heirs or executors—to assigns—execution by attorney.

General power may be transferred—execution by giving power.

Forms prescribed in power must be observed.

The forms and conditions prescribed in the creation of the power for the due execution must be strictly observed ;—as that it shall be executed by deed, or will, or writing ;—with signature, sealing, delivery ;—in the presence or with the attestation of witnesses ;—with enrollment, or any other like ceremony ;—with the consent of certain persons, or with notice to certain persons, or with any other conditions of the like kind (*a*).

Power given in general terms.

A power given in general terms, without any express or implied restriction upon the mode of execution, may be executed by deed or will, or by any writing sufficiently declaring the use or estate appointed (*b*).

(*a*) Sugden, 206, 229; *Hawkins v. Kemp*, 3 East, 410, where Ellenborough, C. J. said of such requisitions that being “unessential and unimportant, except as required by the creators of the power, they can only be satisfied by a strictly literal and exact performance. They are incapable of admitting any substitution, because they have no

spirit in them which can be otherwise satisfied ; incapable of receiving any equivalent, because they are in themselves of no value.” They are, however, introduced chiefly with the object of securing deliberation and certainty, and protecting the interests of those whose estates are to be defeated by the appointment.

(*b*) Sugden, 135, 203.

A power expressly requiring an execution by deed cannot, in general, be executed by will.—But if the mode of execution be extended in terms to any other instrument or writing, it is not then restricted to a deed, and an instrument intended as a will, whether good or not as such, if answering to the description and complying with the formalities required by the power, may be a sufficient execution (*a*). In this respect, a will attested as being “published, acknowledged and declared” as the testator’s will in the presence of witnesses was held to answer the description of an instrument “delivered” (*b*). But a will not sealed nor purporting to be sealed was held not to operate as an instrument “sealed,” as required for the execution of a power (*c*).

Power to be executed by deed.

By other instrument or writing.

Will operating as instrument of execution.

By the 22 & 23 Vict. c. 35, s. 12, “A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity.” A proviso follows saving the effect of any direction in the power as to the consent of any person required, or as to any act having no relation to the mode of executing and attesting the instrument, and also saving an execution conformable with the power.

Statutory form of execution by deed.

(*a*) Sugden, 135, 209, 214; *Proby v. Landor*, 30 L. J. C. 593; 6 Jur. N. S. 1278; *Taylor v. Meads*, 34 L. J. C. 203; “If a power be created to be executed by a deed or instrument in writing, although the words seem to indicate instruments *inter vivos* only, yet it is settled that it may be well executed by will. The reason is that the will literally an-

swers the description of an instrument in writing.” *Per* Westbury, L. C. 1b. p. 206. As to the jurisdiction of equity to supply the defect of an execution by will instead of by deed, see *post*, p. 423.

(*b*) *Smith v. Adkins*, L. R. 14 Eq. 402; 41 L. J. C. 628.

(*c*) *Taylor v. Meads*, 34 L. J. C. 203, and see the cases there cited.

Attestation before the statute.

Before this enactment the ordinary memorandum of attestation of a deed, "sealed and delivered by ——— in the presence of us," etc., applied to the execution of a power requiring attestation, was held not to cover any other form or requirements of execution than those mentioned therein, namely, sealing and delivery; and a power which also required *signing* was not well executed unless the signing was also expressed to be attested (*a*). An attestation in general terms, not particularising the form or mode of execution, was held to cover all such forms and requirements of execution as the deed or instrument expressed in its terms to have been used at its execution (*b*).

Power to be executed by will.

A power to be executed by will cannot be executed by a deed, for the intention of the power that the execution should be revocable would be thereby defeated (*c*).

Statutory form of execution by will.

The Wills Act, 1 Vict. c. 26, (applying to wills made after 1837,) which prescribes a general form for the execution of wills (s. 9), further enacts as to the execution of powers by will (s. 10), "that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required

(*a*) Sugden, 234; and see the cases there cited and discussed. *Wright v. Wakeford*, 17 Ves. 454; 4 Taunt. 213. In consequence of the above doctrine of the restrictive construction of the ordinary memorandum of attestation, expressing the facts of sealing and delivery only, and the doubts thereby thrown on the validity of deeds so attested where signature was required, an Act was passed, 54 Geo. III. c. 168, to the effect that all such deeds in execution of powers then made should have the same validity as if the memorandum of attestation had included signature. But this Act had no prospective operation and left the

doctrine in full effect as to deeds subsequently executed, until it was altered by the enactment above stated.

(*b*) *Doe v. Burdett*, 9 A. & E. 936; S. C. in H. L. nom. *Burdett v. Spilsbury*, 10 C. & F. 340; 6 M. & G. 386. See *Vincent v. Bp. of Sodor & Man*, 5 Ex. 683, 694.

(*c*) Sugden, 210; *Reid v. Shergold*, 10 Ves. 370; see *Thacker v. Key*, L. R. 8 Ex. 408. And there is no jurisdiction in equity to aid such an execution of the power, see *post*, p. 423. As to the construction of a power in regard to execution by will only, see *ante*, p. 399.

shall, as far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity" (a).

The statute applies only to powers admitting in terms of an execution "by will," and does not extend to powers to be executed by other instruments or writings, though a will might answer the description of such instrument or writing and satisfy the terms of the power; in which case, however, the statute will not obviate the defects of the will as such instrument in not satisfying the requirements of the power (b).

An appointment by will partakes of the revocable quality of the will itself in which it is made, and, therefore, is not complete until the death of the testator. Consequently it cannot operate in favour of appointees dying before the testator (c). So it cannot operate as an execution of a power restricted to a certain time, unless the testator die within the time, so that his will may become operative during the continuance of the power (d).

(a) If relating to personalty the will must also be proved, the probate being the sole and conclusive evidence of the will, though not conclusive as to whether the will is a good execution of the power. Sugden, 466. As to the effect of probate as evidence of the will in matters concerning real estate, see *post*, Part IV. 'Wills.' As to the effect of a general devise of real estate, see s. 27, cited *post*, p. 411.

(b) *Taylor v. Meads*, 34 L. J. C. 203; see *ante*, p. 403. "The statute applies to powers requiring specially a will with solemnities in addition to the solemnities rendered necessary by the statute; and in such cases it declares that a will without

such additional solemnities shall be sufficient; but it does not touch the case of a power requiring an instrument signed, sealed and delivered. In such a case the only question is, whether the will be such an instrument, and no help can be obtained from the statute." *Per Westbury*, L. C. 1b. 207.

(c) Sugden, 458, 460. *Freeland v. Pearson*, L. R. 3 Eq. 658; 36 L. J. C. 374; see *Davies' Trusts*, L. R. 13 Eq. 163; 41 L. J. C. 97.

(d) *Cooper v. Martin*, L. R. 3 Ch. 47. And if the power cease before the death of the testator, there is no equity in aid of the appointment in his will. See *post*, p. 423.

Execution by will is revocable

Consents required for execution.

The consent of other persons, which may be required as a condition to the execution of the power, must be obtained, and at the time and in the particular form required by the terms of the power (a).—The death of the person whose consent is so required, or of one of several persons whose joint consent is required, prevents the exercise of the power and so destroys it (b).

Power involving discretion cannot be transferred.

“If the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare*” (c).—So a power of consent, as a condition to the execution of a power by another, cannot be transferred (d).

Power extended to heirs and executors.

The power may be expressly extended to representatives, as the heirs or executors of the donee, who in such case may execute it; but it is not thereby made assignable (e).

Power extended to assigns.

If the power be expressly extended to the assigns of the donee, it may pass to his assignee in law or in fact, either as annexed to an estate or not, and either in his lifetime or at his death, according to the intention of the instrument creating the power (f).

Execution by attorney.

The deed or instrument of appointment under a power, when prepared according to the instructions of the donee, may be executed by attorney, there being no discretion involved in the mere act of execution; unless the power prescribe some particular mode of execution inconsistent with such agency. The deed or instrument is in fact that

(a) Sugden, 252.

(b) Sugden, 252, and see the cases there cited.

(c) Sugden, 179, and see the cases there cited; *Topham v. Duke of Portland*, 1 D. J. & S. 517; 32 L. J. C. 257; 34 Ib. 113.

(d) Sugden, 180; *Hawkins v. Kemp*, 3 East, 410.

(e) Sugden, 129–134, and the cases there cited; see *Cole v. Wade*,

16 Ves. 27; *Bradford v. Belfield*, 2 Sim. 265; *Cooke v. Crawford*, 13 Sim. 91; *Wilson v. Bennett*, 5 De G. & S. 475; 20 L. J. C. 279. Nor is such power transferred to a new trustee appointed merely by the authority of the Court. *Newman v. Warner*, 1 Sim. N. S. 457; 20 L. J. C. 654.

(f) Sugden, 180; *Hall v. May*, 3 K. & J. 585; 26 L. J. C. 791.

of the principal ; it purports to be drawn and executed in his name, though the formal act of execution is by the hand of an attorney (*a*).

A general power, unrestricted as to the objects and as to the execution, may be transferred to another. Thus where an estate is limited generally to such uses as A. shall appoint, he may limit it to such uses as B. shall appoint, and B. will take a general power of appointment. The power in such form is a species of ownership equivalent to the fee simple, involving no trust or discretion except on his own behalf (*b*).

A power to appoint generally to or amongst particular objects may be executed by giving to the objects a general power of appointment, for that is equivalent to ownership, and not a delegation of the original power (*c*). So the power may be executed by giving to an object an estate for life with power to appoint by will (*d*); only if the object of the appointment were not living at the time of the creation of the power, the appointment to him of the power by will would be void for remoteness (*e*).

(*a*) Sugden, 180, 199 ; see *Berkeley v. Hardy*, 5 B. & C. 355.

(*b*) Sugden, 181, 195 ; see *ante*, p. 394.

(*c*) *Bray v. Hammersley*, 3 Sim. 513.

(*d*) *Phipson v. Turner*, 9 Sim.

227 ; *Slark v. Dakyns*, L. R. 15 Eq. 307 ; 42 L. J. C. 524 ; see Sugden, 683.

(*e*) *Wollaston v. King*, L. R. 8 Eq. 165 ; 38 L. J. C. 61, 392 ; *Morgan v. Gronow*, L. R. 16 Eq. 1 ; 42 L. J. C. 410 ; see *post*, p. 460.

General power may be transferred.

Execution by giving power.

§§ 3. CONSTRUCTION AND OPERATION OF THE INSTRUMENT OF EXECUTION.

Intention to execute the power—examples.

Conveyance or devise operating as execution of power—where donee of power has no estate—where donee has estate—where donee, having estate, both appoints and conveys.

Statutory effect of general devise in execution of power—power created subsequently to the will.

Construction of the uses and estates appointed.

Partial and repeated execution of power—execution for mortgage or charge only.

Execution with reservation of new powers of revocation and appointment—new powers must be expressly reserved—new power of revocation does not include new appointment—new powers do not require the formalities of the original power—Execution by will revocable without reservation.

Execution subject to a condition.

Intention to execute the power must appear.

The instrument of execution must show an intention to execute the power ; but it need not expressly recite or refer to the power, provided it point sufficiently to the property subject to it (*a*).

Examples.

A will devising *all the estate which the testator has power to dispose of* may operate as an execution of a power, general or special, notwithstanding the will contain a general charge of debts, which could not attach on the property appointed, and notwithstanding that it purport to devise a greater estate or to include other persons than the power authorises (*b*).—So, a will made *in exercise of every power enabling* the testator, with-

(*a*) Sugden, 201, 289; see *Garth v. Townsend*, L. R. 7 Eq. 220; see *Kennard v. Kennard*, L. R. 8 C. 227; 42 L. J. C. 280, and cases there cited.

(*b*) *Cowx v. Foster*, 1 J. & H.

30; 29 L. J. C. 886; *Ferrier v. Jay*, L. R. 10 Eq. 550; 39 L. J. C. 686; *Teape's Trusts*, L. R. 16 Eq. 442; 43 L. J. C. 87; *Bruce v. Bruce*, L. R. 11 Eq. 371; 40 L. J. C. 141.

without other reference to the power, is sufficient to support it as an appointment (a).—A recital in an instrument to the effect that a person, an object of the power, is entitled to an estate or fund to be appointed may show a sufficient intention to appoint, and if sufficient in respect to form may operate as an appointment (b).—Where a person, having a general power over property vested in a trustee, took a transfer of the property from the trustee and executed the deed of transfer, it was held to operate as an execution of the power (c).

Where a person, having a power to appoint property, but no estate or interest in it, executes an instrument purporting to be a direct conveyance of the property, or devises it by will, without any reference to the power or expressed intention of executing it, the conveyance or devise, if satisfying the requirements of the power as to form and conditions, is taken to operate as an execution of the power, because it can operate only in that way (d).

Where a person has a power of appointment and also an estate in the same property, a conveyance or devise, without any reference to the power, operates presumptively upon the estate only, and not as an execution of the power. But if full effect cannot be given to the intended disposition by way of conveyance or devise, the instrument, if sufficient in other respects, may be taken to operate in execution of the power in order to effectuate the general intention (e).—Thus, if a

(a) *Bruce v. Bruce*, supra.

(b) Sugden, 202; *Wilson v. Pigott*, 2 Ves. jun. 351.

(c) *Marler v. Thomas*, L. R. 17 Eq. 8; 43 L. J. C. 73.

(d) Sugden, 288; 1 Jarman on Wills, 628; Hawkins on Wills, 25; *Clere's Case*, 6 Co. 17 b; *Scrope's Case*, 10 Co. 143 b; *Tomlinson v. Dighton*, 1 P. Wms. 149; 10 Mod. 31; *Att.-Gen. v. Wilkinson*, L. R.

2 Eq. 816; *Gratwick's Trusts*, L. R. 1 Eq. 177, where the gift included a person not an object of the power and was so far void, but was supported as to those appointees who were objects.

(e) Sugden, 343; 1 Jarman on Wills, 628; Hawkins on Wills, 22; see per Turner, L. J., *Pomfret v. Perring*, 5 D. M. & G. 775; 24 L. J. C. 187; *Wildbore v. Gregory*,

Conveyance or devise operating as execution of a power,—where no estate.

Where donee of power has estate.

tenant for life with a power of leasing grant a lease without reference to the power, such lease, as drawn from his estate, would determine with his life ; but, if made in conformity with the power, it may be supported for the whole term as an execution of the power (a).

Execution of
power operating
as conveyance.

On the other hand, where the instrument is expressly made in execution of the power only, and not as a conveyance of the estate, if it be void in execution of the power, it may be supported as against the appointor out of his interest ; but it will not operate as a conveyance contrary to the intention, where the effect of such operation would be prejudicial to the appointee, as by merging a prior interest, or giving a less interest than intended under the power, or where the estate is subject to trusts (b).

Where donee of
power having
estate both
appoints and
conveys.

Where the donee of a power, having also an estate or interest in the land, both executes the power and conveys the estate, the question may arise whether the instrument operates by way of conveyance or appointment. This is a question of construction with reference to the circumstances, and that construction is to be adopted which will best effectuate the intention of the parties (c).—Conveyances are commonly drawn so as to be capable of operating either way, for greater security (d).

L. R. 12 Eq. 482 ; 41 L. J. C. 129. See *Butler v. Gray*, L. R. 5 Ch. 26 ; 39 L. J. C. 291. "If the intention to pass the property can be collected, it will pass under the power, although the donee supposed that it would work by force of his interest. He intends the property to pass and thinks he has all the interest in it, whereas he really has only a power. The intention governs and the power will support the disposition." Sugden, 350.

(a) Sugden, 344, 347 ; per Parker, C. J., *Tomlinson v. Dighton*, 10 Mod. 36 ; *Campbell v. Leach*, Amb. 740.

(b) Sugden, 353 ; *Roe v. Abp. York*, 6 East, 86 ; *Bowes v. East London Waterworks*, 3 Madd. 375. "In a will there are no particular words required to pass the estate ; but any words that show the intention of the testator are sufficient ; and although only the power is expressed to be exercised, yet the words plainly manifest that the testator intended that the devisee should have the estate." Sugden, 353.

(c) Sugden, 357, and cases there cited ; see *Butler v. Gray*, L. R. 5 Ch. 26 ; 39 L. J. C. 291.

(d) See *ante*, p. 382.

By the Wills Act, 1 Vict. c. 26, s. 27, "a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will ;" the section proceeds to enact in the same terms as to personal estate.—A power to appoint to any person by will only is a general power within the section (*a*) ; a power to appoint in any manner amongst children is not (*b*).

Statutory effect of general devise as execution of a general power.

This enactment merely expresses the rule of law, where there is no other estate to satisfy the devise ; but where the testator has an estate as owner, and also a general power over the same or other estates, it alters the previous rule, that a general devise would operate as an appointment only if the intention required it. Under the statute a general devise executes the power unless a contrary intention appear by the will (*c*).

Under this section a charge of debts or legacies, or other general direction as to the application of the testator's estate, may operate as an execution of a general power of appointment (*d*). But the execution will extend only so far as necessary to render such directions effectual, and so far as such directions fail by lapse or otherwise the power will remain unexecuted (*e*).

Direction to pay debts, etc.

(*a*) *Powell's Trusts*, 39 L. J. C. 188.

(*b*) *Cloves v. Awdry*, 12 Beav. 604 ; and see *Hawkins on Wills*, 27.

(*c*) See *ante*, p. 409 ; *Sugden*, 300. As to what dispositions by will operated as an execution of a general power before the statute, see *Sugden*, 301.

(*d*) *Wilday v. Barnett*, L. R. 6 Eq. 193 ; *re Wilkinson*, L. R. 4 Ch. 587.

(*e*) *Davies' Trusts*, L. R. 13 Eq. 163 ; 41 L. J. C. 97. Where see the distinction between such partial execution and an appointment in terms to A. in trust for B. where only the trust fails by lapse or otherwise.

Powers created
subsequently to
the will.

The same statute enables a testator to dispose of all the real and personal estate which he shall be entitled to at the time of his death (sect 3); and further enacts that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (sect. 24).—Hence a general devise may operate in execution of a power created after the date of the will, if it be capable of being so executed (*a*).—But where the power has been created by the testator himself subsequently to his will, it may appear from the circumstances that he did not intend his previous will to operate in execution of it, and accordingly it will not so operate (*b*).

Construction of
uses and estates
appointed.

The limitation of the uses or estates appointed in execution of a power are construed by the rules applicable to the instrument of execution, as being a deed or a will. Therefore, if the appointment be by deed, the same technical terms are required, and receive the same construction as in a conveyance of the like estates. If the appointment be by will, the terms of appointment receive the same construction as wills in general (*c*).—The appointed limitations are construed, in general, in combination with the limitations of the original instrument creating the power and as if inserted therein in place of the power (*d*).

Partial execution.

A power of revocation and new appointment may be executed from time to time as to different parts of the

(*a*) See Hawkins on Wills, 22; *Stillman v. Weedon*, 16 Sim. 26. *Ruding's Settlement*, L. R. 14 Eq. 266; 41 L. J. C. 665.

(*b*) *Ruding's Settlement*, *supra*; *Pettinger v. Ambler*, L. R. 1 Eq. 510; 35 L. J. C. 389, where the testator made a further will after

the creation of the power in partial execution of it. As to the expression of a contrary intention in the will, see *Moss v. Harter*, 2 Sm. & Giff. 458.

(*c*) Sugden, 441.

(*d*) See *ante*, p. 375.

land, or as to different uses or estates, so long as any power continues. Thus, a general power of appointment may be executed by appointing an estate for life at one time, and the fee at another time. So, a power of jointuring or raising portions may be executed from time to time, as required, up to the limits of the power (a).—And an express declaration that the residue of the estate or interest shall go to the remainderman or as in default of appointment is merely a statement of the legal result, and not a complete execution of the power, preventing any further execution of it (b).

Repeated execution.

A power may be executed for the whole legal estate, but only partially for the equitable or beneficial estate; as in the case of an appointment in fee by way of mortgage or charge only, the power is wholly executed at law, but only partially in equity, leaving the equity of redemption or the residue of the beneficial interest still subject to the power; and a mere formal reservation of the equity of redemption is not of itself sufficient to operate as an appointment of the residuary interest, without the intention otherwise appearing to alter the previous title (c).

Execution for mortgage or charge only.

A power, whether general or limited, may be executed with the reservation of a power of revocation and new appointment, although no express authority for such reservation be given in the original power; and a like reservation may be made upon every subsequent execution of the power (d).—And it seems “that such a power may be reserved upon the execution of even a power simply collateral” (e).—“But a power may be so framed as to show that an irrevocable appointment is intended

Execution with power of revocation and new appointment.

(a) Sugden, 272; *Digges' Case*, 1 Co. 173 b; *Hervey v. Hervey*, 1 Atk. 561; *Zouch v. Woolston*, 2 Burr. 1136; 1 Bl. 281.

(b) Sugden, 82; *Zouch v. Woolston*, supra.

(c) Sugden, 273, 274; *Innes v. Jackson*, 16 Ves. 356; 1 Bligh, 104; see *ante*, p. 285.

(d) Sugden, 367; *Adams v. Adams*, Cowp. 651.

(e) Sugden, 389; see *ante*, p. 387.

so as to exclude the right to reserve a power of revocation" (a).

Power of revocation must be expressly reserved.

Where a power of appointment is executed by deed, without a power of revocation being reserved in the deed, the appointment cannot be revoked; although the original power expressly authorise revocation from time to time (b).

Reserved power of revocation does not include new appointment.

A power to revoke reserved upon the execution of a former power, without an express reservation of a power to appoint new uses, does not authorise a new appointment; upon the principle of construction that an instrument exercising a power must expressly reserve the powers intended to be retained (c). In general, however, upon a revocation under the reserved power, the original power would be revived, so as to authorise a new appointment (d).—An original power in a settlement reserved to the settlor to revoke the uses authorises a new appointment without further reservation (e).

New powers not restricted by formalities of original power.

New powers of revocation and appointment reserved upon the execution of an original power are restricted in extent of operation and as to the objects of appointment by the terms of the original power; but they are not restricted in execution by the formalities required by that power. These formalities may be altogether omitted, and the new powers executed in com-

(a) Sugden, 389.

(b) Sugden, 369; *Hele v. Bond*, Sugden, App.

(c) Sugden, 374; *Ward v. Lent-hall*, 1 Sid. 343; 2 Keb. 269.

(d) Sugden, 376; *Montagu v. Kater*, 8 Ex. 507; 22 L. J. Ex. 154; *Evans v. Evans*, 6 D. M. & G. 654.

(e) Sugden, 371; *Witham v. Bland*, 1 Ch. Ca. 241; 3 Swanst. 277. Nottingham, L. C., gives the following note of his reasons in that case:—"First, because the revocation of the first conveyance extended only to the uses limited in it, but could not extend to the common

law estate which passed by the first, for that is irrevocable, *ergo*, a power to limit new uses upon it must remain to the feoffor, without reservation, or his estate is lost; secondly, though no man can have a power of revocation unless he reserves it, no man can want a power of limitation unless he excludes himself from it; thirdly, when a power of revocation is reserved to a stranger, he has no power of limitation unless reserved; *secus ubi* the feoffor himself has the power to revoke." As to the third position, see Sugden, 375.

pliance with those formalities and conditions only which may be prescribed in the terms of their reservation (a).

An execution by will is always revocable by the nature of the instrument, without any express reservation of a power to revoke; and a new appointment may be made at any time by a subsequent will (b). Execution by will always revocable.

A power may be executed conditionally, so as not to take effect until a future time or event; or to be subject to revocation by a future event (c). Thus, an appointment by will, reciting that the appointor had then no children, was construed to be conditional on there being no children; so that, upon children being born, the appointment was inoperative, and the children became entitled under a limitation to them in default of appointment (d). Under a power of appointing portions to younger children to be raised at the death of the parent, an appointment made to a younger child is impliedly conditional upon his continuing to be a younger child until the time of payment; and upon his becoming the eldest son in the lifetime of the parent, the appointment becomes void and a new appointment may be made of that portion (e).—Under a power of appointment to children, who were also entitled in default of appointment, an appointment was made of a share to one upon terms that in case of no complete appointment it should be in place of all claim of the appointee against the property; it was held that such appointment in the event excluded the appointee from any further claim, and impliedly appointed the residue to the other children (f).

(a) Sugden, 366; see *Adams v. Adams*, Cowp. 651; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382. 136; 42 L. J. C. 17.
 (b) Sugden, 387; see *ante*, p. 405. (c) Sugden, 362. (d) *Jefferys' Trusts*, L. R. 14 Eq.
 (e) Sugden, 619; *Chadwick v. Doleman*, 2 Vern. 528; *Teynham v. Webb*, 2 Ves. sen. 198. (f) *Foster v. Cautley*, 6 D. M. & G. 55.

§§ 4. EXECUTION IN EXCESS OF POWER.

Excess as to the objects of the power—appointment amongst persons, some of whom are strangers to the power—appointment to object, with appointment over to stranger—appointment to stranger with appointment over to object.

Appointment to child for life with remainder to his children or issue, not objects—estate tail by *cy-pres* doctrine.

Excess in the estate appointed—lease in excess of power—charge in excess of power.

Appointment with directions and conditions in excess of power—direction that appointed property be settled—invalid directions inseparable from appointment.

Execution in
excess of power.

An appointment in excess of or deviating from the power is, in general, wholly void; but if the excess or deviation can be ascertained and separated from the rest of the appointment, it is void to that extent only. The excess or deviation may be in the objects to whom the appointment is made;—in the estates or interests appointed;—in conditions or qualifications annexed to the appointment (*a*).

Appointment
amongst persons
some of whom
not objects.

An appointment made distributively amongst persons some of whom are objects of the power and some not may be void *in toto* from uncertainty as to what share the proper objects should take; but such an appointment may be supported as to the objects within the power, if it can be taken as in effect distributing the property amongst those objects exclusively, or as giving to them certain specific or ascertainable shares (*b*).

(*a*) Sugden, 498. An execution in excess of the power may be sometimes enforced against the person taking in default of appointment under the equitable doctrine of election, which does not fall within the scope of this work. Sugden, 578; notes to *Streatfield v. Streat-*

field, 1 W. & T. L. C. 319, 3rd ed.

(*b*) Sugden, 504; *Alexander v. Alexander*, 2 Ves. jun. 640; *Sadler v. Pratt*, 5 Sim. 632; *Brown's Trusts*, L. R. 1 Eq. 74; *Bruce v. Bruce*, L. R. 11 Eq. 371; 40 L. J. C. 141.

Where an appointment is made to an object of the power, with an ulterior appointment, either by way of remainder or executory limitation, to a person not being an object of the power, the latter appointment only is void and the prior appointment may stand (a).—But where the ulterior appointment is by way of executory limitation in defeasance of the prior appointment, it may in some cases operate by construction as a conditional limitation of the preceding estate and determine it in the event, though inoperative to pass the estate to the appointee as intended. It may express the intention that the former estate is to cease in the event prescribed, though it fail of further operative effect by reason of the incapacity of the appointee (b).

Appointment to object with appointment over to stranger.

An appointment to a person not within the power followed by an appointment over to an object of the power, either by way of remainder or executory limitation, is void as to the prior appointment but may take effect as to the appointment over.—The ulterior appointment, however, though limited by way of remainder, does not admit of acceleration by removal of the preceding estate; for the prior appointment, though it be made in the form of a particular estate, is wholly void, and leaves only the ulterior appointment, limited to take effect at the period or event prescribed for the determination of the void limitation. In all cases therefore the ulterior appointment can be supported only as an executory limitation, and if it be valid as such, it may take effect in due course; and until it takes effect, the estate goes as in default of appointment (c).

Appointment to stranger with appointment over to object.

(a) Sugden, 503, 511; *Adams v. Adams*, Cowp. 651; *Brown v. Nisbett*, 1 Cox. 13.

(b) *Doe v. Eyre*, 5 C. B. 713; Sugden, 512–514; see *ante*, p. 363.

(c) Sugden, 508, 515; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; *Crompton v. Barrow*, 4 Ves. 681; see *Crozier v. Crozier*, 3 Dr. & W. 353; *Craven v. Brady*, L. R. 4 Eq. 209;

4 Ch. 296; 36 L. J. C. 905; 38 Ib. 345, where, the power being a general one, the ulterior appointment took effect as a remainder and was accelerated by a conditional determination of the particular estate. *Carr v. Atkinson*, L. R. 14 Eq. 397; 41 L. J. C. 785, where the ulterior appointment was to take effect not after an estate ap-

Appointment to child for life with remainder to his children or issue, not objects.

A power to appoint to children does not extend to grandchildren ; therefore an appointment under such a power to a child for life, with remainder to his children or issue is void as to the remainder to the children or issue, who are incapable of taking under the power (*a*).

Construed as an estate tail by the *cy-pres* doctrine.

But where such an appointment is made by will and the remainder is appointed to the children or issue in a manner showing an intention that they should take in a course of descent, it is construed to give an estate tail to the parent, in order to effectuate the general intention of the testator (*b*). This is an application of the *cy-pres* doctrine already explained, which applies to wills, whether devising directly or in execution of a power (*c*). The same construction is not admitted in appointments by deed (*d*).

Excess in estate or interest appointed.

The execution must also keep within the power as to the estate or interest to be appointed.—Thus, under a power to appoint for life, an appointment in tail or in fee would be void (*e*).—So a power to appoint to a particular object is not well executed by appointing to a trustee for that object, at least at law ; but such appointment may be good as to the equitable interest, and the execution supplied in equity (*f*).

Equitable estate instead of legal.

Lease in excess of term.

Under a power to lease for a certain term, as twenty-one years, a lease for twenty-two years or any greater

pointed, but in default of a future appointment authorised to be made to a stranger to the power ; as such appointment could not be made, the ulterior appointment was accelerated.

(*a*) See *ante*, p. 390. Sugden, 503 ; *Adams v. Adams*, Cowp. 651 ; *Brudenell v. Elwes*, 1 East, 442 ; 7 Ves. 382 ; and no case of election arises as between the estate appointed and that passing in default of appointment. *Ib.* ; and see *Wollaston v. King*, L. R. 8 Eq. 165 ; 38 L. J. C. 61,

(*b*) Sugden, 499 ; and cases there cited ; *Line v. Hall*, 43 L. J. C. 17.

(*c*) See *ante*, p. 336.

(*d*) *Adams v. Adams*, Cowp. 651 ; *Brudenell v. Elwes*, 1 East, 451, and see further as to the restrictions upon applying the doctrine, *ante*, p. 337.

(*e*) *Bland v. Bland*, 2 Cox, 349 ; *Wykham v. Wykham*, 18 Ves. 395 ; Sugden, 524,

(*f*) *Churchman v. Harvey*, Ambl. 335 ; see *Wykham v. Wykham*, *supra*.

term is wholly void at law ; but in equity it is void only for the excess and is supported as a valid execution of the power for the term authorised (a). A power to lease for a certain term authorises a lease for a less term (b).

Under a power to lease in possession a lease appointed to commence *in futuro* is void, both at law and in equity (c) ; but a contract to execute a lease at a future time may be enforced when the time comes, if the power then subsist and authorise the lease (d).—A power of leasing in general terms presumptively authorises only leases in possession ; and such a power does not authorise leases in reversion, nor, it seems, future or concurrent leases without special words for that purpose (e).

Under a power to charge a certain sum on land a charge of a larger sum is void only for the excess (f).

Conditions, directions, or qualifications annexed to an appointment which are not authorised by the power are void and may be rejected, and the appointment, if it can be distinguished and separated from the unauthorised terms, may stand unaffected by them (g).—Thus a direction annexed to the appointment that the appointee should share with a person not an object of the power is void and may be rejected (h).—So directions not authorised by the power as to the time of vesting (i).—So a direction that the appointment be accepted in satisfaction of

Lease in reversion.

Charge in excess of power.

Appointment with directions and conditions in excess of power.

Condition that person not an object participate.

Condition that debts be released or paid.

(a) Sugden, 519 ; *Campbell v. Leach*, Ambl. 740 ; *Roe v. Prideaux*, 10 East, 158 ; and see as to the execution of powers of leasing. Sugden, c. XVIII. p. 711. As to reservation of rent and conditions under a power of leasing, see *ante*, p. 397 ; and as to statutory relief against defects in leases under powers, see *post*, p. 427.

(b) *Isherwood v. Oldknow*, 3 M. & S. 382.

(c) Sugden, 520, 760 ; *Bowes v. East London Water Works*, Jacob, 375 ; *Doe v. Calvert*, 2 East, 376. See *Doe v. Day*, 10 Ib. 427 ; *Doe v.*

Robson, 15 Ib. 32.

(d) *Shannon v. Bradstreet*, 1 Sch. & Lef. 52 ; see *Dowell v. Dew*, 1 Y. & C. C. C. 345.

(e) Sugden, 749, 752, 776 ; *Roe v. Prideaux*, 10 East, 184.

(f) Sugden, 521, *Parker v. Parker*, Gilb. 168 ; *Hervey v. Hervey*, 1 Atk. 561, case of excessive jointure.

(g) Sugden, 526.

(h) *Sadler v. Pratt*, 5 Sim. 632. See *Stroud v. Norman*, 1 Kay, 327 ; 23 L. J. C. 443.

(i) *Dillon v. Dillon*, 1 Ball & B. 77 ; *Watt v. Creyke*, 3 S. & G. 362 ; 26 L. J. C. 211.

a debt or that it be charged with debts, or that the appointee release a debt or pay debts (a);—and the appointment in such cases will stand good.

Condition that appointed share be settled, etc.

Where under a power to appoint to children, the appointment of a share is qualified by a direction that it shall be held in trust or settled in a manner to give a benefit to the children or issue of the appointee, or any other persons who are incapable of taking under the power, such direction is, in general, void and inoperative; and the appointment is good and absolute (b).—If the appointee be a party to the instrument of appointment containing such direction or qualification, the latter may be supported as an independent disposition by him of the appointed share; as in the case of the marriage settlement of a child to whom an appointment is made in the form of a settlement of the share upon the issue of the marriage (c).

Appointment combined with settlement by appointee.

But it is a question of construction whether upon the whole instrument the directions which are invalid form a substantive part of the appointment so as to invalidate it, so far as they extend (d).

Invalid directions inseparable from appointment.

(a) *Roberts v. Dixall*, 2 Eq. Ca. Abr. 668. *Cowx v. Foster*, 1 J. & H. 30; 29 L. J. C. 886; *Ferrier v. Jay*, L. R. 10 Eq. 550; 39 L. J. C. 686; but see *Reid v. Reid*, 25 Beav. 469.

(b) Sugden, 516, 664; *Carver v. Bowles*, 2 Russ. & M. 306; *Kampf v. Jones*, 2 Keen, 756; *Woolridge v. Woolridge*, Johns. 63; 28 L. J. C. 689; *Churchill v. Churchill*, L. R. 5 Eq. 44; 37 L. J. C. 92; and there is no election in such cases in favour of the grandchildren or issue, *ib.*

(c) Sugden, 670; see *ante*, p. 390; see *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. C. 410; *Cooper v. Cooper*, L. R. 5 Ch. 203; 39 L. J. C. 240, where the appointment was made to the daughter a minor on her marriage and the settlement made by her husband, giving a reversionary interest to the appointor; the appointment was supported.

(d) Sugden, 518, 529. "In all cases the question depends entirely on the language of the instrument. If you find a clear gift in the first instance, and then limitations over grafted upon it, showing that the object is first to make the gift and then to settle it, the first gift takes effect and the superadded limitations will simply not operate; or if there is a clear gift in the first instance and afterwards words occur which divest it, the court will uphold the gift and reject the divesting words; but if the gift is so coupled with the limitations over as to make them part of the gift, you can only give effect to so much as is authorised by the power, and as to the rest the fund will go as in default of appointment." *Per Wood*, V. C. *Rucker v. Scholefield*, 1 H. & M. 36; 32 L. J. C. 46. See *Reid v. Reid*, 25 Beav. 469.

§ 4. EQUITABLE JURISDICTION OVER POWERS.

§§ 1. JURISDICTION IN AID OF EXECUTION.

Defective execution aided in favour of purchaser, wife, child, etc.
—against persons claiming in default of appointment.

Defects of form aided—execution by will instead of deed—by deed instead of will.

Non-execution or defective intention not aided.

Covenant or contract to execute a power enforced in equity—
covenant to execute future power—covenant to appoint
satisfied by allowing estate to pass in default of appointment.

Powers held in trust enforced in equity—trust for creditors raised
by appointment to a volunteer.

Statutory relief against defects in leases under powers.

Where an intended appointment fails at law from defect in the form or manner of execution required by the power, a court of equity, considering the claim of the appointee in certain cases to be preferable to that of the person becoming entitled in default of appointment, will aid the defective execution by compelling a transfer of the legal estate according to the intention of the appointment (a). Defective execution supplied.

A defective execution is thus aided in equity in favour of persons who have given value for the appointment, as purchasers or lessees, mortgagees and creditors; but not at the suit of volunteers or persons claiming without any consideration;—also in favour of persons for whom the appointor is considered especially bound by relationship to make provision, as a wife, but not in favour of a husband; a child, but not a grandchild;—nor a father or mother, brother or sister, or more distant relation (b). For purchasers, etc.
Wife or child.

(a) Sugden, 530; notes to *Tollet* v. *Tollet*, 1 W. & T. L. C. 207. *Tollet*, 2 P. Wms. 489; 1 W. & T. L. C. 207, also in favour of an appointment to charitable uses. *Innes*

(b) Sugden, 533–535. *Tollet* v.

Illegitimate child.

This equity, it is said, is not extended to an illegitimate child. But the principle of aiding an appointment in favour of a legitimate child, so far as founded on the natural obligation of a man to provide for his offspring, applies with at least equal force to illegitimate children (*a*).—A power of appointment to children *primâ facie* extends to legitimate children only; and where a power is sufficiently general to include illegitimate children, they must be aptly designated in the execution of the power in order to take as appointees (*b*).

Against persons claiming in default of appointment.

This jurisdiction is exercised against the persons taking in default of appointment, whether by express limitation or by act of law, and although such persons are objects of the power equally with the appointee. It is also exercised against purchasers for value claiming under the settlement, as their claim is subject to the power (*c*). But a purchaser for value from an appointee under a defective execution is in no better position than the appointee from whom he derives title (*d*).

Defects of form supplied.

The defects aided in equity are omissions in the form or manner of execution required by the power, as signing, sealing, the presence of witnesses, attestation, and the like; all which, it has been observed, are immaterial except as prescribed arbitrarily by the donor of the power (*e*).

In deeds.

A power of appointment by deed may be well executed in the form prescribed by 22 & 23 Vict. c. 35, s. 12, so

v. *Sayer*, 7 Hare, 377; 3 Mac. & G. 606; Sugden, 208; as to charitable uses, see *post*, Part V. In some cases a defective appointment caused by fraud or accident may be aided under the general doctrines of equity, though the appointees do not answer to any of the above descriptions. Sugden, 572.

(*a*) Sugden, 535; see *Occleston v. Fullalove*, 43 L. J. C. 297; L. R. 9 Ch. 147.

(*b*) See *ante*, p. 372.

(*c*) Sugden, 542, 547; 1 W. & T. L. C. 212, notes to *Tollet v. Tollet*; but as to the equity against an heir, being a child of the appointor and not otherwise provided for than by the inheritance in default of appointment, see Sugden, 545.

(*d*) Sugden, 542.

(*e*) See *ante*, p. 402; Sugden, 558, 560.

far as respects the execution and attestation thereof, although additional or other forms of execution be required by the power, and the aid of equity is so far not required (a).

The execution of a power by will is now regulated by ^{In wills.} 1 Vict. c. 26, s. 10, by which a will executed as required by the Act is made necessary and sufficient, so far as respects the execution and attestation thereof; and, therefore, no relief can be given in equity against the requirements of the statute (b).

It is a general rule that in favour of a proper object, as ^{Execution by will instead of deed.} a wife or child, a court of equity will supply the defect, where a power which ought to have been executed by deed has been executed by will; if there be nothing in the instrument creating the power to mark the intention of the donor of the power, beyond the fact that he has pointed to a deed as the mode of executing the power.— But it is competent to the donor of a power to make the nature and character of the instrument by which it is to be executed of the essence of the power, without which no execution shall be valid (c).

If the power be limited in duration and expire before the death of the donee, his will, though made during the subsistence of the power and purporting to execute it, is no execution, because the power has ceased before the will operates; and in such case there is no jurisdiction to supply the want of execution (d).

A power to appoint by will only cannot be executed ^{Execution by deed instead of will.} by a deed, or by any act to take effect in the lifetime of the donee of the power; nor can such execution be

(a) See *ante*, p. 403. 2 P. Wms. 489; 1 W. & T. L. C. 207; Sugden, 558.
 (b) See *ante*, 404; Sugden, 559.
 (c) See *per* Rolt, L. J., in *Cooper v. Martin*, L. R. 3 Ch. 47, 57; *Bruce v. Bruce*, L. R. 11 Eq. 371; 40 L. J. C. 141; *Tollet v. Tollet*, (d) *Cooper v. Martin*, L. R. 3 Ch. 47; *Potts v. Britton*, L. R. 11 Eq. 433.

aided or supported in equity, for the intention that the power should continue revocable would be thereby defeated (*a*).

No relief against non-execution or defective intention.

The intention to execute the power must sufficiently appear, in whatever form, in order to call for the aid of equity; for the court will in no case supply the non-execution of a power, or what is the same thing, a defect in the intention to execute (*b*).

Covenant or contract to appoint enforced in equity.

An agreement to execute a power in the form of a covenant or valid contract will be enforced in equity; and will thus operate in a manner equivalent to an appointment, in favour of persons for whom a defective execution would be supplied, and upon the same principles. "Contracts are considered as defective executions, and require a sufficient consideration to enable the court to act" (*c*). —As a contract to execute a power may be enforced against the remainder-man or those taking in default of appointment; so where it can be executed in their favour, as in the case of a contract to take a lease or to purchase the estate, the court will compel an execution of it on their behalf (*d*).

Agreement must be in writing.

The agreement to appoint an interest in land must be in writing, in order to satisfy the Statute of Frauds (*e*).

Effect of part performance of parol agreement.

Part performance of a parol agreement by the intended appointee will take the case out of the statute as against the party contracting to execute the power, on

(*a*) Sugden, 560; *Reid v. Shergold*, 10 Ves. 370; see *Thacker v. Key*, L. R. 8 Eq. 408, and it seems that a covenant by the donee of a testamentary power in favour of particular objects to exercise it in a certain manner would be void as controlling his discretion.

(*b*) Sugden, 588; 1 W. & T. L. C. 220; as to the constructions of memoranda or documents as importing an intention to appoint or

dispose of the property, see *ante*, p. 408; *Garth v. Townsend*, L. R. 7 Eq. 220; *Kennard v. Kennard*, L. R. 8 Ch. 227; 42 L. J. C. 280.

(*c*) Sugden, 550, 552; 1 W. & T. L. C. 214, notes to *Tollet v. Tollet*; *re Dykes' Estate*, L. R. 7 Eq. 337.

(*d*) Sugden, 557.

(*e*) Sugden, 550, 554; *Blore v. Sutton*, 3 Mer. 237.

the ground that it would be fraudulent and inequitable for him to repudiate the contract after the other party had acted upon the faith of it. But, as against the remainderman entitled in default of appointment, part performance will have no effect, unless it has been performed upon the faith of some act of acquiescence or permission on his part (a).

A recital in an instrument, as a marriage settlement, that an object of the power is entitled to a certain estate or interest in the property subject to the power, which the instrument proceeds to deal with, may effectually bind the donee of the power, if party to the recital, to appoint accordingly, and may be enforced in equity. If the instrument in other respects satisfy the requirements of the power, it may operate as a direct and perfect appointment, in law as well as in equity (b).

A covenant is a sufficient declaration of intention to execute, and will be enforced in equity, even when made before the power arose, as where a power is limited to be exercised by a tenant for life in possession, and he covenants that when he comes into possession he will execute the power (c). Thus, where a power was given to the successive tenants for life under a settlement as and when they should be in possession to appoint a jointure, and one of the tenants for life on his marriage covenanted that if he should come into possession he would execute the power; having come into possession before his death, it was held that his widow was entitled to have the jointure raised (d).—So where a power was given

(a) Sugden 555; *Blore v. Sutton*, 3 Mer. 237; *Shannon v. Bradstreet*, 1 Sch. & Lef. 52; see *Morgan v. Milman*, 3 D. M. & G. 24; 22 L. J. C. 897.

(b) Sugden 550; *Wilson v. Piggott*, 2 Ves. jun. 351.

(c) 1 Sch. & Lef. 63, per Lord Redesdale, *Shannon v. Bradstreet*;

as to leases granted in intended exercise of power, before acquiring the power, see 12 & 13 Vict. c. 26, s. 4, cited *post*, p. 428.

(d) *Affleck v. Affleck*, 3 Sm. & Giff. 394; 26 L. J. C. 358, notwithstanding the covenantor had become of unsound mind before coming into possession.

Recital showing intention to execute.

Covenant to execute future power.

to a person to be exercised after he should attain the age of twenty-five years and not before, and a covenant to appoint was made before that age; it was held, upon his attaining that age, to be a valid execution in equity (a).

A covenant to execute a power, given in favour of particular objects, to be executed by will only, cannot be enforced; for such a covenant, if valid, would enable the donee to defeat the intention of the power by making an irrevocable appointment (b).

Contract satisfied by allowing estate to pass in default of appointment.

Covenant not to execute.

A covenant to appoint is satisfied in equity by allowing the property to pass to the same object for the same estate by default of appointment (c).

A covenant not to execute a power may operate in equity as a release of the power (d); —and a recital in a deed to that effect may operate as a release (e).

Powers held in trust executed in equity.

A power held in trust without any discretion as to its exercise will be enforced in equity in conformity with the trust, although not executed by the donee of the power; —as a power in trustees or executors to sell the property and apply the proceeds upon trusts; and if the trustee die without executing the power, or if no trustee be appointed to execute it, the court will order a sale and compel the heir to join in conveying (f); but the court will not execute or control a discretionary power (g).

Where a person having a general power of appoint-

(a) *Johnson v. Touchet*, 37 L. J. C. 25.

(b) *Thacker v. Key*, L. R. 8 Eq. 408; see *ante*, p. 423; see *Bulfeel v. Plummer*, L. R. 6 Ch. 160; 39 L. J. C. 805.

(c) *Thacker v. Key*, L. R. 8 Eq. 408; see *Blandy v. Widmore*, 1 P. Wms. 324; 2 Tud. L. C. 378.

(d) *Isaac v. Hughes*, L. R. 9 Eq. 191; 39 L. J. C. 379; see *Scrope v. Offley*, 4 Bro. P. C. 237. *Hurst v.*

Hurst, 16 Beauv. 372; 22 L. J. C. 538.

(e) *Boyd v. Petrie*, L. R. 10 Eq. 482; 7 Ch. 385; 41 L. J. C. 378.

(f) Sugden, 588; and see the cases there cited; see *Brown v. Higgs*, 8 Ves. 561, 574; as to an implied gift or trust for the objects of the power in default of appointment, see *ante*, p. 391.

(g) Sugden, 258, 659.

ment executes it effectually in favour of a volunteer, whether by deed or will, a trust is thereby created for his creditors, and the appointed property is made assets in equity for payment of his debts; though in the administration of the assets of a deceased debtor the property so appointed will not be resorted to until the property descended or devised has been exhausted. If the power be not executed or be defectively executed, there is no jurisdiction in aid of the execution, and no such trust arises for creditors, as against those entitled in default of appointment (a).

Trust for creditors created by appointment to volunteer.

No such trust if execution defective.

But a purchaser for a valuable consideration from the appointee, having a specific claim on the property, is not affected by the general charge of the creditors; and a settlement of the appointed property upon the marriage of the appointee would also be supported against them (b).

Nor against purchaser from appointee.

Execution may be had by a judgment creditor against any lands over which the debtor has any disposing power which he may exercise for his own benefit; but the judgment does not operate as a charge upon the land until it is actually delivered in execution (c).

Execution against land subject to power.

Statutory relief is provided against defects in leases granted by persons having valid powers of leasing in certain cases by 12 & 13 Vict. c. 26, amended by 13 & 14 Vict. c. 17. Sect. 2 enacts "that where in the intended exercise of any such power of leasing, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or

Statutory relief against defects in leases under powers.

(a) Sugden, 474, 540, 588; 2 White & Tudor, L. C. 121, notes to *Silk v. Prime*; *Holmes v. Coghill*, 7 Ves. 499, 12 Ves. 206; *Fleming v. Buchanan*, 3 D. M. & G. 976, 22 L. J. C. 886.

(b) *George v. Milbanke*, 9 Ves. 190; see *per Grant*, M.R., 1 Mer. 639, *Daubeny v. Cockburn*.

(c) 1 & 2 Vict. c. 110, s. 11; 27 & 28 Vict. c. 112; as to delivery under the latter statute where the legal estate is outstanding. See *Hatton v. Haywood*, L. R. 9 Ch. 229; 43 L. J. C. 372; *Beckett v. Buckley*, L. R. 17 Eq. 435; *re South*, 43 L. J. C. 441. See *post*, Part IV. 'Legal Process.'

Defective lease considered in equity as a contract.

shall hereafter be granted, which is, by reason of the non-observance or omission of some condition, or restriction, or by reason of any other deviation from the terms of the power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bonâ fide*, and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require) have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: provided always, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation."

Proviso where lease may be confirmed.

Confirmation by acceptance of rent.

By sect. 3, the acceptance of rent shall be deemed a confirmation of such lease, if accompanied with a signed receipt or note in writing confirming such lease (see 13 & 14, Vict. c. 17, s. 1, 2). By the latter Act, sect. 3, where the reversioner is able and willing to confirm, the lessee is bound to accept the confirmation.

Lease may become valid by subsequent power.

By sect. 4, "where a lease granted in the intended exercise of any such power of leasing is invalid by reason that at the time of the granting thereof the person grant-

ing the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease."

By sect. 5, "when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this Act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease" (a).

Lease supported
by power though
not referred to.

(a) See the effect of these enactments stated and commented on in Sugden, 571.

§§ 2. JURISDICTION TO SET ASIDE EXECUTION.

Execution in fraud of the power set aside in equity—examples—
motive distinguished from purpose of execution.

Appointment to child in consideration of benefit to parent—con-
sideration paid by a third party.

Appointment for the purpose of disposing to a person not an
object of the power.

Appointment for ulterior purpose consistent with the power.

Execution partly in fraud of the power—appointment of jointure
in excess of interest given to wife—appointment to one of
children in fraud of the power.

Subsequent execution after prior invalid appointment.

Purchaser from appointee under fraudulent appointment.

Illusory appointment under non-exclusive power.

Execution in
fraud of power
set aside.

The execution must be within the purpose and inten-
tion of the power, which is to be collected from the
true construction of the instrument creating it, without
regard to any purpose or design of the donor not therein
expressed; and if an appointment, though correct in
point of form and operative at law, be made for any
indirect or ulterior purpose not warranted by the power,
it will be set aside in equity as a fraud on the power (*a*).

Thus, where a parent, having a power of appointment
amongst his children, and being desirous of preventing
one of his daughters from marrying a particular person,
for that purpose appointed the portion intended for that
daughter to one of his sons, upon a trust or understand-

(*a*) *Topham v. Duke of Portland*,
11 H. L. C. 32; 34 L. J. C. 113;
L. R. 5 Ch. 40; 39 L. J. C. 259;
Sugden, 606; 1 W. & T. L. C. 339,
notes to *Aleyn v. Belchier*. "The
donee, the appointor, under the
power, shall, at the time of the
exercise of the power, and for any
purpose for which it is used, act
with good faith and sincerity and

with an entire and single view to
the real purpose and object of the
power, and not for the purpose of
accomplishing or carrying into effect
any by or sinister object—sinister
in the sense of its being beyond the
purpose and intent of the power."
Per Westbury, L. C., in Topham v.
Duke of Portland, *supra*.

ing that his son should retain the control over it, and withhold it or not from the daughter according to the event; the appointment was held to be a fraud on the power and void. In the same case the parent, in pursuance of the same purpose, made a settlement of property with a power of appointment in favour of the daughter, but upon an understanding and with the direction to the donee of the power that he should execute it in a manner to promote such purpose, which, however, was not expressed in the deed; it was held that the intention of the power was to be collected from the instrument creating it only, and that extrinsic evidence of the purpose of the donor was inadmissible; but that such evidence was admissible to show the purpose for which the power was in fact executed, and that the execution, being in pursuance of a purpose not authorised by the power, was void (*a*).

Upon the same principle, where a father, having a power of appointment amongst children, appointed to one who was a lunatic and likely to die, for the purpose of himself succeeding to the appointed share as his representative, the appointment was held to be fraudulent against the other objects of the power and void (*b*). But where under like circumstances the appointment was made in favour of an infant then in good health, it was held good, though in the event the appointee died in infancy, whereby the father became entitled as his next of kin to the exclusion of the reversioners (*c*). For, it was said, "provided a power in other respects is well

(*a*) *Topham v. Duke of Portland*, supra, where Hatherley, L. C., said, "The court will not allow him (the donee) to interpret the donor's intention in any other sense than the court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is re-

garded as a fraud on the power." and see *Lec v. Fernie*, 1 Beav. 483, where the owner of the property had reserved the power to himself, and it was held that he was nevertheless bound by its terms.

(*b*) *Wellesley v. Mornington*, 2 K. & J. 143.

(*c*) *Beere v. Hoffmister*, 23 Beav. 101; 26 L. J. C. 177.

executed, the fact that it is executed to defeat those in remainder is not any ground for avoiding the execution" (a).

Motive of appointment distinguished from purpose.

The mere motive of an appointment apart from the purpose to be effected by it, as the indulgence of feelings of preference or animosity towards the objects, is immaterial to the validity. "The court cannot inquire into the motive, but it can inquire into the intention or purpose" (b).

Appointment to child in consideration of benefit to parent.

If a parent, having a power of appointment amongst his children, execute it in consideration of some benefit to be derived to himself from the appointment, as upon an agreement with the appointee for a payment or advance of money, the appointment is void as being in fraud of the power in regard to the other children; and as the appointee is a participator in the fraud and benefits by it, such appointment will be set aside *in toto*, and not merely to the extent of the sum (if any) diverted from the objects of the power (c).--In a case where the whole fund was appointed to one of the children, who immediately requested the trustee of the fund to transfer it to the parent, the trustee, in complying with such request was held to have committed a breach of trust and to be liable to replace the fund (d).

(a) *Per Romilly, M. R.*, 1b.; and see *Butcher v. Jackson*, 14 Sim. 444; *Fearon v. Desbrisay*, 14 Beav. 641.

(b) Sugden, 618; *Vane v. Lord Duncannon*, 2 Scho. & Lef. 130, 131, *per Lord Redesdale*; *Campbell v. Home*, 1 Y. & C. C.C. 664. See the distinction between motive and purpose pointed out in *Topham v. Duke of Portland*, 1 D. J. & S. 570; L. R. 5 Ch. 57.

(c) *Daubeny v. Cockburn*, 1 Mer. 626; *Farmer v. Martin*, 2 Sim. 511; *Arnold v. Hardwick*, 7 Sim. 343; see *Humphrey v. Oliver*, 28

L. J. C. 406; *Cooper v. Cooper*, L. R. 5 Ch. 203; 39 L. J. C. 240, where an appointment made upon the marriage of the daughter with a settlement of the property appointed was supported, under the circumstances, although the appointor took a reversionary interest under the settlement.

(d) *Mackenzie v. Marjoribanks*, 39 L. J. C. 604. And as to the liability of trustees refusing to convey according to the appointment, see *Firmin v. Pulham*, 2 De G. & S. 99; *Campbell v. Home*, 1 Y. & C. C. 664; *Cockcroft v. Sutcliffe*, 25 L. J. C. 313.

Where the consideration for the preference of one of the children is given by another person, and not derived out of the property appointed, and though without the knowledge of the appointee, the appointment will be set aside; for it is a fraud upon the power in regard to the other objects who are thereby excluded from the property appointed (a).

Consideration paid by third party.

An appointment made upon any bargain or understanding that the appointee shall dispose of the property to persons who are not objects of the power is void and will be set aside (b).—An appointment made for the purpose and in the expectation that the appointee would transfer the property to a person, not an object of the power, was held void, though that purpose was not at the time communicated to the appointee (c).—But an appointment to a child upon marriage with a view to a suitable settlement being then made, though to include persons not objects of the power, is valid as being a proper mode of enjoyment of the property by the appointee (d).

Appointment for purpose of disposing to persons not objects.

An ulterior purpose may be consistent with the power;—as where the appointment is made for the purpose of making a title to enable all the persons interested to deal with the property in their respective interests. Thus an appointment may be well made to enable the appointee to join in selling the property. Where a tenant for life with an exclusive power of appointment amongst his children sold the estate and then appointed to one son in fee, who joined with him in conveying to the purchaser, the title was held good, as it did not appear that the son

Appointment for ulterior purpose consistent with power.

(a) *Rowley v. Rowley*, 1 Kay, 242; 23 L. J. C. 275.

Pryor, 2 D. J. & S. 33; 33 L. J. C. 441.

(b) *Sugden*, 615; *Daubeny v. Cockburn*, 1 Mer. 626; *Salmon v. Gibbs*, 3 D. & Sm. 343; *Lee v. Fernie*, 1 Beav. 483; *Birley v. Birley*, 25 Beav. 308; 27 L. J. C. 569; *Ranking v. Barnes*, 33 L. J. C. 539; 12 W. R. 565; *Pryor v.*

(c) *Marsden's Trust*, 4 Drew. 594; 28 L. J. C. 906.

(d) See *Pryor v. Pryor*, supra. *Fitzroy v. Duke of Richmond*, 27 Beav. 190; 28 L. J. C. 752; and see ante, p. 420.

To enable appointee to join in sale.

Appointment for purpose of making a mortgage,

or lease,

or settlement.

got less than the value of his reversionary interest on acceding to the purchase (a). So an appointment may be made by a tenant for life with power of appointing the remainder to his children, for the purpose of enabling the appointees to join him in a mortgage, the money being expressed to be advanced to all of them, and being applied in a business in which they were all partners (b); or for the purpose of making a building lease for the improvement of the property in the interest of all parties (c). An appointment may be made for the purpose of the appointee making a settlement on his or her marriage, though to include persons not objects of the power (d).

Execution partly in fraud of power.

The Court cannot, in general, distinguish what is attributable to an authorised purpose from what is attributable to an unauthorised purpose, and the bad purpose affects the whole appointment; but if the evidence enable the Court to make the distinction, the appointment will be void only *pro tanto* (e).

Appointment of jointure in excess of interest given to wife.

Where a power of jointuring was executed upon an agreement that part of the jointure should be applied to pay the debts of the husband, the appointment, as to that part, was set aside. Such an execution of the power, so far as it goes to the wife who is the sole object of the power, is good and may be supported; but so far as it diverts the property from her as the object of the power, it is in excess of the power and in fraud of the persons entitled in default of appointment (f).

(a) *M'Queen v. Farquhar*, 11 Ves. 467; *Campbell v. Home*, 1 Y. & C. C. C. 664; as to questioning like transactions between father and son on the ground of undue influence or improper appropriation of the proceeds, see *King v. King*, 1 D. & J. 663; 27 L. J. C. 29; *Warde v. Dixon*, 28 L. J. C. 315.

(b) *Cockcroft v. Sutcliffe*, 25 L. J. C. 313.

(c) *Re Huish's Charity*, L. R. 10

Eq. 5; 39 L. J. C. 499.

(d) See *ante*, p. 433; *Pryor v. Pryor*, 2 D. J. & S. 33; 33 L. J. C. 441.

(e) See *per* Turner, L. J., in *Topham v. Duke of Portland*, 1 D. J. & S. 517; 32 L. J. C. 270; and see *Trollope v. Routledge*, 1 D. & Sm. 662.

(f) Sugden, 609; *Lane v. Page*, Ambl. 233; *Aleyn v. Belchier*, 1 Eden, 132; 1 W. & T. L. C. 339.

Under a power of appointment to children, an appointment made to one of them in fraud of the power will not invalidate an appointment made of the rest of the property to the others at the same time (*a*). And it seems that an appointment of a specific share to the same appointee to whom the invalid appointment is made, if unconnected with the invalidity, may be supported (*b*).

Appointment to one of children in fraud of power.

If a prior appointment be invalid, a subsequent appointment may be made of the same property under the original power; but it must be clearly shown to be free of the purpose or influence which has invalidated the prior appointment (*c*).

Subsequent execution after prior invalid appointment.

A purchaser from the appointee under an appointment which may be set aside for the above causes, though he gave value and had no notice of the improper execution of the power, would have no better title in equity than the appointee himself (*d*).

Purchaser from appointee has no better title.

A distributive or non-exclusive power formerly required a share to be given to each of the objects of the power; but it was satisfied, at law, by giving some amount or interest, however small, to each object, either by way of direct appointment, or (which amounts to the same thing) by leaving sufficient residue unappointed to be divided amongst all the objects in default of appointment.

Illusory appointment under non-exclusive power valid at law.

(*a*) *Topham v. Duke of Portland*, supra; *Rowley v. Rowley*, 1 Kay, 242; 23 L. J. C. 275.

(*b*) *Ranking v. Barnes*, 33 L. J. C. 539; 12 W. R. 565.

(*c*) Sugden, 285, 355; see *Farmer v. Martin*, 2 Sim. 502; *Humphrey v. Olver*, 28 L. J. C. 406; *Carver v. Richards*, 1 D. F. & J. 548; 29 L. J. C. 357; *Askham v. Barker*, 12 Beav. 499; *Topham v. Duke of Portland*, L. R. 5 Ch. 40; 39 L. J. C. 259. "Where an appointment has been set aside by reason of what

has taken place between the donee of a power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained, otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first." *Per* Giffard, L. J., *Topham v. Duke of Portland*, supra.

(*d*) *Daubeny v. Cockburn*, 1 Mer. 626; see *Warde v. Dixon*, 28 L. J. C. 315.

But void in equity.

But in equity, before the passing of the statute 1 Will. IV. c. 46, appointments, under non-exclusive powers, whereby an unsubstantial, illusory or nominal share of the property was appointed to, or left unappointed to devolve upon any of the objects were invalid, although the like appointments were valid in law; and it was necessary to inquire in each case of appointment what was a sufficiently substantial share to satisfy the power (a).

Made valid in equity by statute.

The statute 1 Will. IV. c. 46 (passed to alter and amend the law relating to illusory appointments), enacted that no appointment which from and after the passing of the Act should be made in exercise of any power or authority to appoint any property real or personal amongst several objects should be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only should be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment should be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects should not thereunder or in default of appointment take more than an unsubstantial, illusory, or nominal share of the property subjected to such power.

The effect of this Act was not to convert all such powers into exclusive powers; but it placed them in the same position in equity as at law, requiring that each object of the power should take some share, however unsubstantial, in order to satisfy the non-exclusive form of the power (b).

Appointment not to be invalid on ground of exclusion.

Now by the Act to amend the law as to appointments under powers not exclusive, 37 & 38 Vict. c. 37, s. 1, it is enacted "that no appointment, which from and after the passing of this Act shall be made in exercise of any

(a) Sugden, 449, App. 938; 1 W. & T. L. C. 358, notes to *Aleyn v. Belchier*.

(b) *Gainsford v. Dunn*, L. R. 17 Eq. 405; 43 L. J. C. 403.

power to appoint any property real or personal amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power."

Section 2 provides "that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

Power non-exclusive as to declared amount or share.

Under the law applying to appointments made before the passing of this Act, where there are several appointments to different objects of the power at different times, and one is ultimately excluded, the ultimate appointment, disposing of the residue of the property, only is invalid; for to that appointment only the exclusive effect can be attributed (a).—But where several appointments are made to take effect at one time, as in the case of appointments by will with an ultimate residuary appointment, the exclusive effect is attributable to all equally and all are void (b).

Execution by successive appointments.

(a) *Young v. Lord Waterpark*, 13 Sim. 202; see *Trollope v. Routledge*, 1 D. & Sm. 662. It may be made good by the invalidity of a prior appointment whereby the share thereby appointed passes to

all the objects in default of appointment. *Ranking v. Barnes*, 33 L. J. C. 539; 12 W. R. 565.

(b) *Bulfeel v. Plummer*, L. R. 6 Ch. 160; 39 L. J. C. 805.

SECTION V. PERPETUITIES AND ACCUMULATIONS.

§ 1. The Rule against perpetuities.

§ 2. Accumulation of rents and profits.

§ 1. THE RULE AGAINST PERPETUITIES.

The Rules restricting the limitation of future estates—remainders—springing uses and executory devises.

The Rule against perpetuities stated—any lives may be taken as the measure of the time and a term of twenty-one years—time of gestation allowed, when child taking is *in ventre sa mère*—application to limitations of terms of years.

Limitations to persons to be ascertained by description.

Limitations to a class of persons—children—grandchildren—limitations upon death of children.

Limitations upon failure of issue—upon failure of issue within restricted period—of term of years upon failure of issue—construction of phrases importing failure of issue—exceptional constructions of limitations on failure of issue.

Validity of limitations is independent of subsequent events—limitation to class containing objects too remote—where the shares are ascertained within the period.

Limitations with modifications too remote—directions to postpone the possession beyond the period.

Limitation in alternative of limitation too remote—limitation in restricted alternative.

Limitations restricted by the duration of the estate limited—estate for life of living person—leasehold for life.

Limitations after estates tail—provisoes for cesser of estate tail—limitations to take effect after determination of estate tail—term preceding estate tail upon trusts subsequent.

Application of the rule to powers—power may be unrestricted in terms—execution of the power is subject to the rule—the time is computed from the creation of the power—general power is equivalent to ownership.

Power to appoint to grandchildren or remoter issue—appointment must take effect within the rule—power in marriage settlement to appoint to children,

Powers of sale, leasing, etc. may be unrestricted in terms—power of sale with consent — power of sale extending over estates tail—powers impliedly restricted to the continuance of the settlement.

The limitation of future estates is subject to restrictions as to the time of taking effect, which differ according to the nature of the limitation, as operating by way of remainder, or by the way common to springing and shifting uses and executory devises.

The restrictions upon the limitation of future estates.

The restrictions upon limitations by way of remainder have already been considered. They are, for the most part, involved in the dependence of the remainder upon the particular estate, requiring that it must become vested in interest pending that estate, so as to take effect in possession immediately upon its determination. The limitation of remainders is further restricted by the positive rule that, (though they may be limited to the unborn child of a living person,) they cannot be limited to the issue of a person unborn (*a*).

The restrictions upon remainders.

The particular estate supporting a remainder may be an estate for life or in tail, and an estate tail may endure throughout indefinite generations of issue; but the tenant in tail in possession for the time being, when of full age, has the power, by means of a disentailing assurance, to acquire or convey an estate in fee simple discharged of all remainders. Therefore, the limitation in remainder after an estate tail remains effectual only during the minority of the tenant in tail; and if the estate tail be preceded by an estate or estates for life, as in an ordinary settlement of land, the limitations in remainder, though valid in creation, cannot be made effectual in operation beyond the lives of the tenants for life and twenty-one years, the possible minority of the tenant in tail (*b*).

Remainder not effectual beyond estates for life and minority of tenant in tail.

On the other hand, limitations by way of springing

(*a*) See *ante*, pp. 318, 328, 334.

(*b*) See *ante*, p. 335.

Restrictions
upon springing
uses and execu-
tory devises.

use and executory devise arise and take effect according to the terms of limitation independently of the preceding estates, which they supersede and defeat ; consequently there are no restrictions inherent in the nature of such limitations as there are in remainders. If limited after or in defeasance of an estate tail they may be discharged or destroyed by the disentailing assurance of the tenant in tail ; but a tenant in fee simple cannot by any means destroy or get rid of the executory limitations of this kind which may operate upon his estate. Therefore, except where preceded by an estate tail, these limitations require a special rule of restriction ; otherwise they might be employed in a manner to restrain the alienation of the land for an indefinite period or in *perpetuity* (a).

Rule against per-
petuities stated.

A rule has accordingly become established by judicial decisions, founded chiefly on analogy to the limits of a settlement at common law by way of particular estates and remainders, that limitations by way of springing or shifting use or executory devise must take effect within the period of a life or lives in being at the time of creating the limitations and twenty-one years afterwards. This rule is known as *the rule against perpetuities* (b).

A limitation which infringes the rule is void of effect ; but it is not therefore to be taken as struck out of the

(a) See *ante*, p. 219 ; 1 Sanders on Uses, 145, 153, 4th ed. ; Fearne, C. R. 423 ; 1 Hayes on Conv. 136, 5th ed., where see remarks on the greater power of tenant in tail over executory limitations.—“ The best definition (of a perpetuity) seems to be that supplied by Mr. Sanders in his Essay on Uses, (p. 196,) who says :—‘ A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property, discharged of such future use or estate, before the event is determined or the

period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.’ ” Lewis on Perpetuities, 164.

(b) *Bengough v. Edridge*, 1 Sim. 173, 267 ; S. C. nom. *Cadell v. Palmer*, 7 Bligh, N. S. 202 : see Lewis on Perp. c. xi ; Butler’s note to Co. Lit. 271 b, III. 2 ; Butler’s notes to Fearne, C. R. 429, 566 ; and the same rule applies to trusts and equitable estates, see *post*, p. 471 ; Butler’s note to Co. Lit. 290 b, s. XIV.

will or deed altogether; it may be read as part of the context for all purposes of construction, as if no such rule existed (a).

The lives of any persons and of any number of persons, though wholly unconnected with the limitations in point of interest, may be taken for the measure of the period. Also a term of twenty-one years independent of any estate limited, or of the infancy of any person taking an estate or interest (b). If lives be not selected as part of the period restrictive of the limitation the rule imports that it must take effect within twenty-one years (c).

As a child *in ventre sa mère* is considered as a person *in esse* for the purpose of taking property, the limits of the rule may be in fact extended by the time of the gestation of such child;—thus if a devise be made to the child of A. for life, such child being *in ventre sa mère* at the testator's death, the additional time of gestation may accrue at the commencement of the period allowed by the rule, which may be measured by the life of such child and twenty-one years;—so, if a devise be made to

Any lives may be taken as the measure of the rule.

And a term of twenty-one years.

Time of gestation allowed, when child taking is *in ventre sa mère*.

(a) *Heasman v. Pearse*, L. R. 7 Ch. Ap. 275; 41 L. J. C. 705.

(b) *Cadell v. Palmer*, *supra*.

(c) See *Palmer v. Holford*, 4 Russ. 403. It may be here observed that the rule against perpetuities, though framed by analogy to the limits of perpetuity possible with common law limitations by way of estates for life and remainders, leads to some different results. The latter mode of limitation is restricted, as to perpetuity, by the lives of the persons actually taking estates, and by the actual minority of the ultimate remainder-man; whereas the rule against perpetuities admits of an absolute period measured by lives and years, but wholly independent of the lives or minority of the persons actually interested; and in the case of the ultimate taker at the extreme limit

of the period being a minor the disability to alienate might in fact be extended for a further period of twenty-one years. Again, the rule as to remainders prohibits absolutely the limitation of them to the issue of persons unborn; but the rule against perpetuities admits of executory limitations to the children or remoter issue of persons unborn, provided they are restricted to vest within the allowed period; and only when not so restricted such limitations are void. In the above respects, therefore, remainders are more restricted than other executory limitations; on the other hand remainders may be limited on events of indefinite contingency, provided they become vested pending the particular estate. See 1 Jarman on Wills, 229; *Stuart v. Cockerell*, L. R. 7 Eq. 363.

the children of A. who shall attain the age of twenty-one years, and A. die leaving a child *in ventre sa mère*, the additional time of gestation may accrue at an intermediate period, and the limits of the rule may be extended until such child attains the age of twenty-one years ;—so if the ultimate taker after a given period of lives in being and twenty-one years be a child *in ventre sa mère*, the limits of the rule may be in fact extended at the termination of the period by the time of gestation (a).

Application of the rule to limitations of terms of years.

The same rule applies to executory bequests of terms of years and chattel interests in land (b) ;—and, it seems, also to the creation of future terms of years (c).

Limitations to persons to be ascertained by description.

Examples of the application of the rule occur with limitations to a person to be ascertained by some description or character or qualification, which may not be satisfied within the allowed period (d). Thus, a devise to the first or other son of A. (having no son at the time of the devise,) who should be in holy orders, was held void for remoteness, because A. might have a son who might take orders so as to answer the description more than twenty-one years after the death of A. ; and a devise over in the same will, in case A. should have no such son, was also held void, as being limited upon a contingency which might not become ascertained until an equally re-

(a) 1 Jarman on Wills, 222 ; *Long v. Blackall*, 7 T. R. 100 ; *Blackburn v. Stables*, 2 V. & B. 367.

(b) Hargrave's note (5) to Co. Lit. 20 a ; *Fearne*, C. R. 460.

(c) Sanders (on Uses, p. 198,) states :—" I do not find any rule of the common law confining the period within which the entry under a condition is to be made ; and although an *interesse termini* may be created at common law, I am not aware of any case at the common

law, fixing the period, within which it must take effect in possession." But, he adds, " it can scarcely be doubted, that by analogy to the modern doctrine of perpetuities, the rights of entry upon common law conditions, and the *interesse termini* would be confined to the time allowed in cases of executory devises and springing uses." And this opinion is adopted in Lewis on Perpetuities, p. 614.

(d) Lewis on Perpetuities, c. xviii. ; 1 Jarman on Wills, 233.

mote period (a).—So, a devise made to such person as should from time to time bear a certain title, in order that the property should be held with the title, was held void for remoteness, because the title might remain in abeyance for an indefinite period; and though that case did not happen, the validity of the limitation could not depend upon contingencies which might cause it to be good or bad according to the event (b).

A devise to the first heir male of the body of A. who should attain twenty-one was held to be void for remoteness; because the person so described might not be ascertained within the allowed period,—all the heirs male of the body of A. during that period might die in their minorities (c).—A devise to the first son of A. who should attain twenty-one would obviously be good, though A. have no son at the time of the devise, as it must take effect, if at all, within twenty-one years of the death of A.

To heir attaining a certain age.

A bequest of personal estate made to the first tenant in tail under a settlement of real estate who should attain twenty-one, was construed to extend only to the tenants in tail taking by purchase under the settlement, and not to include tenants in tail by descent, and therefore being within the allowed period of limitation was good (d).

Limitations to a described class of persons, as children, issue and the like, must be so restricted that the objects of the class become ascertained within the time allowed by the rule. Thus, an executory devise to all the children of A. who shall attain the age of twenty-one, though it include children born after the testator's death, is good;

Limitations to class of persons, as children.

(a) *Procter v. Bp. Bath & Wells*, 2 H. Bl. 353. See 1 Jarman on Wills, 242.

(b) *Tollemache v. Earl Coventry*, 5 Madd. 232; 8 Bligh, N. S. 547; 1 Jarman on Wills, 235.

(c) *Kerr v. Lord Dungannon*, 1

D. & W. 509; S. C. nom. *Lord Dungannon v. Smith*, 12 Cl. & F. 546.

(d) *Christie v. Gosling*, L. R. 1 H. L. 279; 35 L. J. C. 667; see *Harrington v. Harrington*, L. R. 5 H. L. 87; 40 L. J. C. 716.

because it must necessarily be ascertained within the life of the parent and twenty-one years. But if it were to such children of A. as should attain the age of twenty-two, or any greater age than twenty-one, and included after-born children, it would be void for remoteness, as possibly not to be ascertained within such limit of time (a).—So, a devise to the children of A. who should be living at the end of twenty-eight years from the death of the testator was held void, because the time for ascertaining the objects was too remote; and a gift over in case there should be no such child was also held to be too remote (b).

To grandchildren.

A devise or bequest may include all the testator's grandchildren, born and to be born, without infringing the rule, as they must all be born within lives in being at the testator's death; and the vesting of their shares may be further postponed during their minorities, but not beyond. On the other hand, a devise or bequest including all the grandchildren, born and to be born, of any other person is too remote, because children might be born to that person after the testator's death, and grandchildren might be born at any time during the lives of those children (c). But a gift to the children of A. who shall attain twenty-one and the issue of such of them as shall die under twenty-one is good because necessarily ascertained within the life of A. and twenty-one years after his death (d).

It may be observed that limitations to a class, as to the children of A. who shall attain the age of twenty-two, or to the children and grandchildren of A., may be good,

(a) 1 Jarman on Wills, 226, and see the cases there cited; *Stephens v. Stephens*, Cas. t. Talb. 228; *Leake v. Robinson*, 2 Mer. 363; *Edmondson's Estate*, L. R. 5 Eq. 389; *Smith v. Smith*, L. R. 5 Ch. 342. As to the construction of devises to children, see *ante*, p. 370.

(b) *Palmer v. Holford*, 4 Russ.

403.

(c) 1 Jarman on Wills, 233; *Newman v. Newman*, 10 Sim. 51; *Smith v. Smith*, L. R. 5 Ch. 342; *Stuart v. Cockerell*, L. R. 7 Eq. 363; 5 Ch. 713; 39 L. J. C. 729.

(d) *Moseley's Trusts*, L. R. 11 Eq. 499; 40 L. J. C. 275.

if limited by way of contingent remainder, though void by way of executory devise, as being too remote; by the rules regulating remainders they would be restricted to such objects of the class as would be ascertained at the determination of the particular estate (a).

A devise limited to take effect in the case of all the children of a living person dying under the age of twenty-one is good; but if postponed until their death at any time, or at any age greater than twenty-one, it is too remote (b).—A devise over in case of all the children of a person dying under a certain age may, in some cases, be construed to include the contingency of there being no children, so as to take effect either if the person has no children, or if, having children, they do not attain the given age, and the limitation as regards the former contingency may be supported separately, though the limitation as regards the latter contingency be void (c).

Future uses and executory devises limited to take effect upon failure of the issue of A. indefinitely, are obviously too remote (d).—But if there be a preceding limitation to A. for an estate in tail general, the limitation over upon failure of the issue of A. is good as a remainder (e). Also, if there be a preceding limitation to A. and his heirs, with a limitation over on failure of issue of A. indefinitely,

(a) See *ante*, p. 341; 1 Jarman on Wills, 229.

(b) *Sayer's Trusts*, L. R. 6 Eq. 319; 36 L. J. C. 350, where it was held that a gift over upon the death of all the children A. could not be supported by evidence that at the date of the will A. was past the age of childbearing, showing that the testator could only mean the children then living. Where a gift was made to the children of a person, with a direction that the shares should not be vested until twenty-five, and a gift over in case of death under twenty-five, it was held, in

order to effect the intention of the whole will, that "vested" must be construed as meaning "indefeasible," and the gift over was void for remoteness. *Edmondson's Estate*, L. R. 5 Eq. 389.

(c) See *ante*, p. 370; *Mackinnon v. Sewell*, 2 M. & K. 202; *Wilson v. Mount*, 2 Beav. 397; *Doe v. Challis*, 18 Q. B. 231; 29 L. J. Q. B. 121; 7 H. L. 531; see *Brookman v. Smith*, L. R. 6 Ex. 291; 7 Ib. 271; 41 L. J. Ex. 114.

(d) *Fearne*, C. R. 444.

(e) See *ante*, p. 364.

the estate of A. is restricted to a fee tail, and the limitation over is a remainder, by a well-known rule of construction (a). And by a further rule of construction applicable to wills, a devise in terms to A. for life, with a devise over upon failure of issue of A. indefinitely, gives A. an estate tail with remainder over (b).

Limitation upon failure of heirs.

An executory devise limited to take effect upon the failure of heirs of a person is too remote (c); but when following a devise to such person and his heirs, and limited to one who is capable of becoming a collateral heir of such person, the word heirs in the first devise is construed as heirs of the body, reducing the devise to an estate tail, and the devise over operates by way of remainder (d).

Limitations upon failure of issue within a restricted time.

A future use or executory devise limited to take effect upon failure of issue of A. restricted within a definite period not too remote may be good:—as a limitation to take effect upon the death of A. without issue living at his death;—or upon the death and failure of issue of A. in the lifetime of B.;—for such limitations must take effect, if at all, upon the death of A. or before the death of B.—So, a limitation to take effect, if A. die leaving issue at his death, and such issue die under the age of twenty-one years, is within the limits of the rule (e).—Such limitations over upon restricted failure of issue have no implied effect, like limitations over upon indefinite failure of issue, in enlarging or restricting the preceding limitation to an estate tail, because they correspond to the determination of an estate tail only in a particular event; but if they follow a limitation in tail, they take effect by way of remainder, contingent upon the failure of issue at the death of A.

(a) See *ante*, p. 181.

(b) See *ante*, p. 182.

(c) *Griffiths v. Grieve*, 1 J. & W. 31.

(d) See *ante*, p. 176.

(e) *Fearne*, C. R. 468, 470; *Pells v. Brown*, Cro. Jac. 590; *Duke of Norfolk's Case*, 3 Ch. Ca. 1; 2 Freem. 80.

or other event specified, by which the estate tail is determined (a).

An executory bequest of a term of years limited to take effect upon failure of issue, unless restricted within the period allowed by the rule, is too remote. And such a limitation cannot in any case be supported as a remainder, (like a limitation upon failure of issue after an estate tail,) because a term of years, as personalty, is not capable of such mode of limitation, all future limitations of such property being essentially executory (b).—If a term be bequeathed to A for life, with a bequest over upon failure of issue of A. indefinitely, the limitation over is void, but A. takes the absolute interest in the whole term; for the bequest of a term or other personal estate by such words as would create an estate tail in realty gives the absolute interest (c).

In the construction of deeds limiting estates in land, the words *die without issue*, *without having issue*, *without leaving issue*, *for want*, or *in default* or *on failure of issue*, and other like expressions presumptively import the failure of issue indefinitely or at any period. The same construction prevails in wills made before the year 1838, and, in general, whether of real or personal estate; except that the phrase *die without leaving issue*, applied to personal estate is construed to mean a failure of issue at the death. So that in a case where both real and personal estate were devised and bequeathed together to the same person, with a limitation over in the event of his dying without leaving issue, the construction varied with the two species of property; he took an estate tail in the realty, (implied from the devise over upon indefinite failure of issue,) and the absolute interest in the personalty, subject to an executory bequest in case of his death without leaving issue surviving (d).

Limitation of term of years upon failure of issue.

Construction of phrases importing failure of issue.

(a) See *ante*, pp. 182, 364.

(c) See *ante*, p. 203; *Elton v.*

(b) See *ante*, p. 320; *Fearne, C.*

Eason, 19 Ves. 73.

R. 460, 478.

(d) See *ante*, p. 183; *Forth v.*

Statutory construction in wills made since 1837.

In wills made on or after 1st Jan. 1838, a statutory construction is given to these and to the like expressions in devises or bequests of real or personal estate; and they are to be construed as meaning a failure of issue in the lifetime or at the death and not an indefinite failure of issue; unless a contrary intention appear by the will by reason of the person referred to having a prior estate tail (*a*).

Exceptional cases of construction,—devise on failure of issue, following devise to issue.

Some exceptional cases occur in the construction of devises over upon failure of issue.—Where a devise upon failure of issue follows a devise to children, sons, or other particular branch or class of issue, it may refer only to the objects of the prior limitation, and so be restricted to the failure of *such* issue. These cases are expressly excepted from the statutory construction put upon words expressing failure of issue by the 1 Vict. c. 26, s. 29 (*b*).

Devise on failure of testator's own issue.

Where a testator, having no issue at the time of making his will, makes a devise upon failure of issue of himself, he is considered to refer only to a failure of issue at his death and not to an indefinite failure of issue (*c*).

Devise of reversion of estate tail on failure of issue in tail.

If a testator, being entitled to a remainder or reversion expectant upon an estate tail, devise it upon failure of the issue in tail, the devise is not executory but immediate, the limitation upon failure of issue being merely descriptive of the reversionary interest.—If the reversion or remainder be expectant upon an estate in tail male or other estates tail not comprehending all the issue, a devise of such reversion or remainder upon a general failure of issue of the tenant in tail is, according to the literal construction, executory, and, if not further re-

Chapman, 1 P. Wms. 663; 2 *Jarman on Wills*, 418; *Hawkins on Wills*, 205; *Fearne*, C. R. 471, 476.

(*a*) 1 Vict. c. 26, s. 29, cited *verbatim*, *ante*, p. 183.

(*b*) See the section and proviso, *ante*, p. 183. See the rules for applying this referential construction discussed at length in 2 *Jarman on*

Wills, 361–406.

(*c*) 2 *Jarman on Wills*, 421; the birth of a child does not revoke a will, and therefore is a contingency which a married testator may be presumed to contemplate and provide against. A will is revoked by marriage, 1 Vict. c. 26, s. 18; see *post*, Part IV. 'Wills.'

stricted within the period allowed by the rule, is void (*a*). But where land is settled for estates tail not comprehending all the issue, a limitation over upon failure of issue in the same instrument, whether a deed or a will, or in a subsequent instrument or appointment referring to the former limitations, will generally be read as meaning the failure of issue under the entail and as applying to the reversion or remainder expectant upon the estates tail, unless a contrary intention appear (*b*).

The rule of construction in wills may be here noticed, that where a devise is made to A. in fee simple, with a devise over "if A. die under 21 *or* without issue," the word "or" may be read "and," and the failure of issue thereby restricted to the death of A. under twenty-one; this construction is adopted to support the presumed intention not to exclude the issue, if A. die under 21 leaving issue, which result would follow upon the literal construction (*c*).—So, where A. was heir at law of the testator and took the fee by descent, and there was a devise over in the above terms (*d*).—But this rule is not applied after an estate tail, because the devise over on failure of issue may then take effect as a remainder (*e*).

Devise over on death under 21 or without issue, or read as *and*.

The validity of a limitation as to remoteness is determined at the time of its creation,—at the date of the deed, if by deed,—or at the death of the testator, if by will;—and if it may then possibly exceed the limits allowed by the rule, it is void, without regard to the subsequent course of events which may, in fact, sufficiently restrict its operation. Thus, a devise over

Validity of limitation is independent of subsequent events.

(*a*) *Lady Lanesborough v. Fox*, Cases t. Talb. 262; *Banks v. Holme*, 1 Russ. 394 n; *Egerton v. Jones*, 3 Sim. 409; 2 Jarman on Wills, 406, 413; Fearne, C. R. 448.

(*b*) *Eno v. Eno*, 6 Hare, 171; see *Ellicombe v. Gompertz*, 3 M. & Cr. 127.

(*c*) See *ante*, p. 361; 1 Jarman on Wills, 444; the same construc-

tion is applied to personal estate, *ib.* 446; Hawkins on Wills, 203; *Right v. Day*, 16 East, 69; *Fairfield v. Morgan*, 2 B. & P. N. R. 38.

(*d*) *Johnson v. Simcock*, 29 L. J. Ex. 478; 31 *Ib.* 38; 7 H. & N. 344.

(*e*) *Mortimer v. Hartley*, 6 Ex. 47.

upon the indefinite failure of issue of A. is void, notwithstanding in the event A. die without having had issue, or without leaving issue him surviving, so that the devise might take effect immediately upon his death (a).

According to this principle of applying the rule a gift to the children of A. who should be living at a period too remote is held to be void, notwithstanding the moral certainty, from the age of the parents, that no children could be born after the death of the testator (b). So a gift over upon the death of all the children of A., under, like circumstances, was held void (c).

Limitation to class containing objects too remote.

A limitation to a class of persons, some of whom may not be ascertained within the limits of time, is not rendered valid by the fact that some of the objects of the class are already ascertained, or that some or all objects of the class become eventually ascertained within the period allowed; because the impossibility of ascertaining the number of shares within the proper period involves the whole gift in uncertainty. Thus, where a bequest was made to A. for life and after his decease to the child or children of A. who should attain the age of twenty-five, it was held that the bequest was wholly void, without any exception in favour of children living at the death of the testator (d).

May be valid as to shares ascertained within the period.

But where, upon a gift to a class of persons, the number of shares must become ascertained within the period, and the destination of some of the shares only is too remote, the limitation as to the rest may be valid. —Thus, a testator devised to A. for life, with remainder to the children of A. in equal shares for life, with remainder, as to the share of each child, to the children of

(a) 1 Jarman on Wills, 233; see *Jee v. Audley*, 1 Cox, 324, *per* Kenyon, M. R., “the question is, not whether the limitation is good in the events which have happened, but whether it were good in its creation.”

(b) *Jee v. Audley*, 1 Cox, 324.

(c) *Sayer's Trusts*, L. R. 6 Eq.

319; 36 L. J. C. 360; but see *Eno v. Eno*, 6 Hare, 171, where such circumstance was considered in construing a limitation upon failure of issue.

(d) 1 Jarman on Wills, 231; *Leake v. Robinson*, 2 Mer. 363, 382, 388; *Smith v. Smith*, L. R. 5 Ch. 342.

that child in fee; the devise was held good, except only as to the remainders in the shares of the children of A. born after the testator's death, the number of shares being finally ascertained at the death of A (a).

Thus also, a gift to the children of A. who should attain twenty-one, and the issue of such of them as should die under twenty-one, such issue to take only the share of their parents, but conditionally upon their attaining twenty-one; was held good as to the shares of the children who attained twenty-one, because the number of shares must be ascertained within 21 years of the death of A., though void as to the shares of those dying under twenty-one, because the vesting of such shares was postponed until the issue (of children who might not be born until after the testator's death) attained twenty-one (b).

Where a future interest is limited to vest within the prescribed limits of time, but is attended with a clause settling or modifying the interest in a manner extending beyond the limits, and which is therefore void, the substantive limitation may stand unaffected by the subsequent clause. Thus, a testator having given his residuary estate to his children in equal shares directed that the share of each daughter should be settled upon her for life and after her decease upon such of her children who should attain the age of twenty-five; it was held that the absolute gift to the daughter in the first instance was restricted only in favour of her children, and that restriction being void, it remained absolute (c).

If a future interest be limited to vest within the period allowed, with a direction to postpone the possession

Limitations with modifications too remote.

Directions to postpone possession only beyond the period.

(a) *Catlin v. Brown*, 11 Hare, 372.

L. J. C. 95.

(b) *Moseley's Trusts*, L. R. 11 Eq. 499; 40 L. J. C. 275; and see the same principle applied in *Storrs v. Benbow*, 3 D. M. & G. 390; 22 L. J. C. 823; *Wilson v. Wilson*, 28

(c) 1 Jarman on Wills, 257; *Arnold v. Congreve*, 1 Russ. & M. 269; *Carver v. Bowles*, 2 Russ. & M. 306; *Ring v. Hardwicke*, 2 Beav. 352.

beyond that period, the direction as to the possession may be rejected and the limitation may be good (a).

Thus, devises to all the children of A. *when* and *as* they attain, or *at* or *upon* their attaining, some given age, have been construed as giving vested interests in the children as they come into existence, but with a postponement of the possession or distribution ; which, if extended to postponing the possession of unborn children beyond the age of twenty-one is void (b).—With vested interests, not being remainders, the possession cannot be effectually postponed unless there be a divesting limitation to take effect within the period of postponement, for a person of full age taking a presently vested and indefeasible interest in the property is not bound to let the income accumulate, which he himself will be ultimately entitled to ; he may dispose of his whole interest as soon as he is competent to do so (c).

Limitation in
alternative of
event beyond the
rule.

A limitation, after a limitation too remote, which is limited to take effect in the alternative of the same event, is also too remote ; and it is not accelerated by the prior limitation being void, or by the alternative of the event in fact happening within the prescribed period. As a devise to the children of A. who should be living at the end of twenty-eight years from the death of the testator, with devises over in case there should be no such child ;

(a) "It is no objection to the validity of a devise, that it postpones the possession beyond the limits prescribed for the vesting of estates ; for, in such a case, the doctrine under consideration has no other effect than to vacate the postponement, and thereby accelerate the possession." 1 Jarman on Wills, 252.

(b) *Farmer v. Francis*, 2 Bing. 151 ; *Murray v. Addenbrooke*, 4 Russ. 407 ; *Judd v. Judd*, 3 Sim. 525 ; *Doe v. Ward*, 9 A. & E. 582 ; see *Simpson v. Peach*, L. R. 16 Eq.

208. As to the reference of such expressions to a limitation over, see *ante*, p. 367 ; and see 1 Jarman on Wills, 733–767.

(c) See *Josselyn v. Josselyn*, 9 Sim. 63 ; *Saunders v. Vautier*, 1 Cr. & Ph. 240 ; 4 Beav. 115 ; *Smith's Will*, 24 L. J. C. 466 ; and see *Harbin v. Masterman*, L. R. 12 Eq. 559 ; 40 L. J. C. 760, where in the case of a gift to charities with directions to accumulate, they were held not entitled to present possession, by reason of the fluctuating character of the recipients. See *post*, p. 468.

the devise to the children is void as possibly not ascertained until a period too remote, and the gifts over not being to take effect until after the same period, which is too remote, are necessarily void also (a).

But a limitation in an alternative to a too remote event, if restricted to happen within the allowed limits, may be good.—As if a devise be made to the children of A. who should attain the age of twenty-five, and in case A. should die without leaving issue at his death, or leaving issue they should all die before the age of twenty-five, then to B.; the devise in the event of A. dying without leaving issue would be good, and that in the event of A. leaving issue would be bad (b).—A limitation over in the event of the death of all the children of A. under a certain age, which if exceeding twenty-one years would render the limitation void for remoteness, may be construed in some cases to extend to the event of there being no children, as a separate alternative event, and in such event the limitation would be good (c).

A limitation in terms too remote may be restricted in effect by the duration of the estate limited, which may be such as must determine within the period allowed, as an estate for the life of a living person. Thus an executory devise, after the failure of issue of A., to B. for life is good, because the estate must necessarily take effect, if at all, during the life of B., and the rule, as to the time of limitation, is excluded (d).

(a) *Palmer v. Holford*, 4 Russ. 403; see *Procter v. Bp. Bath & Wells*, 2 H. Bl. 358; *ante*, p. 443; *Robinson v. Hardcastle*, 2 T. R. 241; 2 Bro. C. C. 22; *Routledge v. Dorril*, 2 Ves. 357; *Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; 1 Jarman on Wills, 242.

(b) *Cambridge v. Rous*, 8 Ves. 12; *Leake v. Robinson*, 2 Mer. 363; see the remarks on these cases in 1 Jarman on Wills, 246. And see *Beard*

v. Westcott, 5 Taunt. 393; *Longhead v. Phelps*, 2 W. Bl. 704; *Crompe v. Barrow*, 4 Ves. 681.

(c) See *ante*, p. 370, n (a).

(d) "Though an executory devise in tail or in fee to one *in esse* after a dying without issue, is void; yet an executory devise for life to one *in esse*, to take place after a dying without issue, may be good; because in the latter case, the future limitation being only for life of one *in esse*,

Limitation in restricted alternative.

Limitations restricted by duration of the estate limited.

But this exclusion of the rule extends no further than the life estates created in living persons; and the rule applies as to other limitations for transmissible interests to take effect upon the failure of issue, though created at the same time and in the same instrument. Thus, a testator (before 1838) devised all his estate, upon failure of issue of A. to be divided between certain persons named, but the part of one for life only; it was held that, though the devise for life to the one was good, and would take effect if that one should be living when the issue failed, yet the devise of absolute transmissible interests to the others, to take effect upon the indefinite failure of issue, was void for remoteness (*a*).

Limitation contingent on person being alive.

A future limitation may purport to be made to a person to take effect upon an indefinite failure of issue or any other remote period, for any estate, if made contingently upon his being then alive; for then it would be expressly restricted within the limits allowed (*b*).

Leaseholds for lives or terms of twenty-one years.

The same doctrine applies to future limitations of leaseholds for lives, or for terms of years determinable

it must necessarily take effect during that life, or not at all; and therefore the failure of issue, in that case, is confined to the compass of a life in being." *Fearne*, C. R. 488. *Roe v. Jeffery*, 7 T. R. 589, in which case a devise to A. and his heirs and in case he should die and leave no issue to B. was held to mean leaving no issue at death; but it has been observed that the decision can only be supported on the ground of the devise over being of life estates. 7 A. & E. 660, in *Doe v. Ewart*; see *ante*, pp. 183, 447.

(*a*) *Barlow v. Salter*, 17 Ves. 479, *Grant*, M. R., there said,—"Where nothing but a life interest is given over, the failure of issue must necessarily be intended a failure within the compass of that life; but where the entire interest is given over, the mere circumstance that one taker is confined to a life inte-

rest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person at the time when the event happens on which the limitation over is to take effect." See *Rye's Settlement*, 10 Hare, 106; 22 L. J. C. 345; *Stuart v. Cockerell*, L. R. 7 Eq. 363, 368; *Fisher v. Webster*, L. R. 14 Eq. 283; 42 L. J. C. 156. The above doctrine can have little application to wills coming under the operation of 1 Vict. c. 26, s. 29, which restricts the failure of issue to meaning failure at death unless a contrary intention appear. 1 Jarman on Wills, 256 (n); see *ante*, p. 183.

(*b*) *Pells v. Brown*, Cro. Jac. 590; see the observation on *Palmer v. Holford*, 4 Russ. 403, in 1 Jarman on Wills, 231 n (x); and see *ante*, p. 446.

with lives, or for an absolute unexpired term of years not exceeding twenty-one; these are not subject to the rule against perpetuities, because the limits of duration of the estate sufficiently restrict the vesting within the allowed period (a). Thus, where a term was created of one hundred and twenty years, if twenty-eight persons named or the survivor of them should so long live with an additional term of twenty years from the expiration of that term, and was made the subject of a settlement, the limitations of the settlement, though in terms void for remoteness, were allowed to be good because restricted in effect by the subject to which they were applied (b);—but the above doctrine seems not to be applicable to renewable leaseholds, for such estates are equivalent to indefinitely continuing interests (c).

Renewable leasehold.

The rule against perpetuities is not applied to executory limitations, whether by way of shifting use or executory devise, which are to take effect in defeasance or upon the determination of an estate tail; because the power of disposition of the tenant in tail for the time being, by means of a disentailing assurance, extends over all subsequent limitations of whatever kind and enables him to acquire or convey the fee simple, and the freedom of alienation is thereby preserved (d).

Rule not applied to limitations after estates tail.

Estates tail may, therefore, be settled subject to conditional limitations or provisoes for cesser, with limitations over, indefinite as to time, as a proviso divesting the

Provisoes for cesser of estate tail.

(a) Butler's note (e) to Fearn, C. R. 500: see *King v. Cotton*, 2 P. Wms. 676, cited in Fearn, C. R. 489; *Low v. Barron*, 3 P. Wms. 262; *Wastneys v. Chappel*, 1 Bro. P. C. 457.

(b) *Bengough v. Edridge*, 1 Sim. 173; S. C. nom. *Cadell v. Palmer*, 7 Bligh, N. S. 202.

(c) See *ante*, p. 203; Lewis on Perp. 681.

(d) "If the executory devise is subsequent to an estate tail, it will

be good, because the power which resides in the owner of that estate to destroy all posterior limitations, executory as well as vested, by means of an enrolled conveyance, (now substituted for a common recovery,) takes the case out of the mischief of, and consequently out of the rule against perpetuities." 1 Jarman on Wills, 223; see *ante* p. 219, 440; and see 1 Sanders on Uses, 194; 2 Hayes Conv. 170, n (156); Lewis on Perpetuities, c. xxxii.

estate in the event of the tenant in tail or any issue in tail neglecting to assume the name and arms of the settlor,—or in the event of their becoming entitled to other settled estates;—for such limitations or provisoes may be barred by the disentailing assurance of the tenant in tail (a).—Whereas such limitations over in defeasance of an estate in fee simple, as they could not be barred by the tenant, would be void, unless expressly restricted to operate within the period allowed by the rule against perpetuities (b).

Limitations
operating during
or at determina-
tion of estate
tail.

Accordingly, where a devise was made for estates tail, with remainder to trustees upon trust to sell and to divide the proceeds amongst the children of A. who should be then living and the issue of such of them as should be then dead, with a proviso that if any of such issue should be then dead leaving issue, the issue should take the share of the parent, the proviso, though operating throughout the continuance of the estates tail, was held valid; and it was laid down by the court “that whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell and to divide the produce amongst such class, is wholly immaterial, if the legal and beneficial interests should be both ascertainable at the moment of the determination of the estate tail” (c).

Limitations
operating after
determination of
estate tail.

An executory limitation after an estate tail, which may not be ascertained at the determination of the estate tail, (not being a contingent remainder, which must take effect then or not at all,) though it may be barred by the tenant in tail during his tenancy, may be incapable of being barred by the remainder-man after the

(a) See *ante*, pp. 218, 352; *Nicolls v. Sheffield*, 2 Bro. C. C. 215; *Carr v. Earl of Erroll*, 6 East 58; *Doe v. Earl of Scarborough*, 3 A. & E. 897.

(b) See *ante*, p. 440.

(c) *Heaseman v. Pearse*, L. R. 7 Ch. 275; 41 L. J. C. 705. *Morse v. Ormonde*, 5 Madd. 99; 1 Russ. 382.

determination of the estate tail, and in this view may be considered to be subject to the rule against perpetuities ; but there does not appear to be any direct authority upon the point.

Thus, if land be limited to A. in tail male with remainder to B. in fee, subject to an executory limitation to take effect upon the general failure of issue of A., such executory limitation would seem not to be withdrawn from the rule by reason of the prior estate tail, since it might be neither barred nor ascertained during the continuance of the estate tail, and after the determination of that estate, it could not be barred by the tenant in fee, and would be open to all the objections the rule is intended to meet (*a*).

If a term of years be created antecedent to an estate tail, it cannot, nor can any trusts of the term be barred by the tenant in tail. The trusts of such term are therefore subject to the rule against perpetuities and must be limited to take effect within the period allowed by the rule (*b*). Thus where a term was created prior to estates tail upon trusts to raise portions upon failure of issue in tail, the trusts were held void for remoteness (*c*).

Term preceding estate tail upon trusts subsequent.

Where a term was created and subject thereto the land settled for life estates with remainders in tail in succession, a power given to the trustees of the term, during the minority of any person who should be from time to time entitled under the settlement to the immediate freehold for life or in tail, to enter into possession and manage the estates, was held void for remoteness (*d*).

(*a*) See Lewis on Perpetuities, 671; *Hartopp v. Lord Carbery*, cited in 1 Sanders on Uses, 197. See *Bristow v. Boothby*, 2 Sim. & St. 465; *Morse v. Lord Ormonde*, 5 Madd. 99; 1 Russ. 382.

(*b*) *Eales v. Conn*, 4 Sim. 65; *Case v. Drosier*, 2 Keen, 764; 5 M. & Cr. 246.

(*c*) *Case v. Drosier*, supra, L. Langdale, M. R., there said:—
“There are no means by which the

charges in this case could be barred; they depend upon a term and that term is precedent to the estates tail, so that after a recovery there would remain a term and a trust to be performed: a trust which could not be defeated, and a term which cannot be destroyed.” *Sykes v. Sykes*, L. R. 13 Eq. 56; 41 L. J. C. 25.

(*d*) *loyer v. Bankes*, L. R. 8 Eq. 115.

Application of the rule to powers.

The rule against perpetuities applies to powers, but with the modifications required by the nature of a power.

Power may be unrestricted in terms.

A power may be unrestricted in its terms as to the remoteness of the appointment authorised, provided it do not expressly direct an appointment beyond the rule; because the power alone gives no estate, but only the authority to appoint estates and interests. Where the object of a power, as appearing in its terms, is to create a perpetuity, it will be considered simply void.—But the appointment under a power must be restricted to estates and interests which shall take effect within the time allowed by the rule (*a*).

Execution is restricted by the rule.

Time is computed from creation of the power.

The uses and estates appointed take effect from the instrument creating the power, as if originally inserted therein in place of the power. Therefore the time allowed by the rule is, in general, computed from the creation of the power and not from the appointment; that is, from the execution of the deed, if the power be created by deed, and from the death of the testator, if by will (*b*).

Under general power time is computed from the appointment.

But a general power, not restricted as to objects or time of execution, is equivalent, as regards the disposal of the property, to the absolute ownership; and the execution of such a power is considered, in substance, as an original disposition. Therefore, the time within which the limitations appointed under it must take effect is to be computed from the execution of the power and not from the creation of it (*c*).—Thus, if A. were to convey his estate to his unborn son for life, remainder to the sons of that son as purchasers, the limitations to the children of the son would be void as tending to a perpetuity; but

(*a*) Sugden on Powers, 31, 151, 8th ed.; *Duke of Marlborough v. Earl Godolphin*, 1 Eden, 404; S. C. nom. *Spencer v. Duke of Marlborough*, 5 Bro. P. C. 592, where, in a settlement of land, a power given to trustees, on the birth of the unborn tenants in tail, to con-

vert their estates tail into estates for life with remainder to their sons in tail, was held void as creating a perpetuity.

(*b*) See *ante*, p. 375; Sugden, 396, 470; Lewis on Perpetuities, v. xx.

(*c*) Sugden, 394.

if A. were to convey his estate to such uses generally as he should appoint, he might afterwards, upon the birth of a son, limit the estate to that son for life, remainder to his sons as purchasers, in precisely the same terms as if at the birth of the son he had been seised in fee (a).

A general power to appoint by will is not equivalent to absolute ownership, because it restrains alienation during life; and therefore the estates appointed must vest within the time computed from the creation of the power (b).

General power to appoint by will.

According to these principles, a power may be well created to appoint to grandchildren or other more remote issue of a person, without any express restriction to those who may be born within the time allowed from the creation of the power; but the appointment authorised is impliedly so restricted, and the power, so far as it extends to more remote objects, is simply void.—An appointment to any objects of such power living at the time of the appointment would be valid; also an appointment restricted to those objects, whether grandchildren or remoter issue, who may be born in the lifetime of the donee of the power, or within twenty-one years of his death, would be valid; because such appointments must take effect within the limits of time allowed from the creation of the power (c).

Power to appoint to grandchildren or remoter issue.

—But an appointment to the grandchildren or remoter issue, without restriction as to the time of their birth, would be void altogether, even as to those who are in fact born within such limits of time. Unless it could be supported as a distinct appointment of certain shares to those of the objects who are capable of taking, leaving the residue unappointed (d).

Appointment including objects too remote is void.

Accordingly, a power of appointment in a marriage

(a) Sugden, 395.

(b) *Powell's Trusts*, 39 L. J. C. 188.

(c) Sugden, 152, 397; *Routledge v. Dorril*, 2 Ves. 357; as to the construction of powers in extending

to issue, see *Thomas v. Thomas*, 14 Sim. 234; *Thomas v. Lloyd*, 25 Beav. 620.

(d) See *ante*, p. 450. Sugden, 505; 1 Jarman on Wills, 250; *Griffith v. Pownall*, 13 Sim. 393.

Power in marriage settlement to appoint to children.

Appointment to child for life with remainder to his children

To child on marriage.

To child for life with power to appoint by will.

settlement amongst the issue of the intended marriage is restricted in execution to issue born at the death of the parents or within twenty-one years after.—An appointment under such power to children for life, with remainder to their children, would be void as to the latter as being too remote (*a*).—And an appointment under such power to a child cannot be postponed in vesting beyond the death of the parents and twenty-one years after. Thus, an appointment to a child to vest on marriage is too remote, being an event which might occur at any time during the life of the child unborn at the date of the settlement (*b*).—So, an appointment to a child for life, with power in the child to appoint by will, is too remote, as to the power by will; because postponed until the death of a person unborn at the date of the settlement (*c*). Although a power given in favour of a living person may be well executed by appointing to him an estate for life, with a power of appointment by will (*d*).

Powers of sale, etc. may be unrestricted in terms.

Powers of sale and exchange, of leasing, and the like powers which operate only upon the subject of the property in settlement, without affecting the limitations of the settlement otherwise than transferring them to the new or altered subject of property, may be indefinite in the terms of their creation, as to the period of execution; as where limited to trustees and their heirs, or to trustees and their executors, or to trustees for the time being of a settlement containing powers of renewing the trustees (*e*).—If such powers are conditioned to be executed with

(*a*) *Bristow v. Warde*, 2 Ves. jun. 336; *Crompe v. Barrow*, 4 Ves. 681; *Brudenell v. Elwes*, 1 East, 442. 1 Jarman on Wills, 248.

(*b*) *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. C. 410.

(*c*) *Wollaston v. King*, L. R. 8 Eq. 165; 38 L. J. C. 61, 392; *Morgan v. Gronow*, L. R. 16 Eq. 1; 42 L. J. C. 410.

(*d*) *Phipson v. Turner*, 9 Sim. 227; *Slark v. Dakyns*, L. R. 15 Eq. 307; 42 L. J. C. 524; see *ante*, p. 407.

(*e*) *Boyce v. Hanning*, 2 C. & J. 334; *Biddle v. Perkins*, 4 Sim. 135; *Wood v. White*, 4 M. & Cr. 460. "Under the exercise of a power of sale and exchange there is merely a change of title, and not a destruction of interest. In point of

the consent of the tenant for life or other person living, they are restricted in exercise within due limits by the express condition of the execution (a).—Such powers, as extending over estates tail in the settlement, are not subject to the rule against perpetuities, because in common with all executory limitations to take effect in defeasance of an estate tail, they may be barred by the disentailing assurance of the tenant in tail, and his power of alienation is not restricted by them (b).

Power of sale with consent of tenant for life.

Power of sale extending over estates tail.

But the powers of this kind in a settlement are impliedly restricted to the continuance of the settlement; and when the ultimate remainder or reversion in fee under the limitations of the settlement has vested in possession, giving an absolute power of disposition, the powers can no longer be exercised (c).

Power of sale, etc., restricted to the continuance of the settlement.

fact, such a power enables the alienation of property without affecting the interest of the person beneficially entitled to the property." Sugden, 848; see *ante*, p. 379.

(a) Sugden, 849; see *Wolley v. Jenkins*, 23 Beav. 53; 26 L. J. C. 379.

(b) Sugden, 850; *Waring v. Coventry*, 1 M. & K. 249; *Wallis v. Freestone*, 10 Sim. 225.

(c) Sugden, 850; *Wood v. White*, 4 M. & Cr. 460; *Wolley v. Jenkins*,

23 Beav. 53; 26 L. J. C. 379; *Grey v. Jenkins*, 26 Beav. 351; *Brown's Settlement*, L. R. 10 Eq. 349; 39 L. J. C. 845; see *Lantsbery v. Collier*, 2 K. & J. 709; 25 L. J. C. 672. "When the uses of the settlement and the purposes of the settlement are spent, the power is no longer capable of being exercised." *Per Wood*, V.C. *Ib.*; and see *Doncaster v. Doncaster*, 3 K. & J. 26. See *ante*, p. 382.

§ 2. ACCUMULATION OF RENTS AND PROFITS.

Accumulation of rents and profits restricted by statute—exception of provisions for payment of debts, portions, etc.

Accumulation allowed during one only of the statutory periods.

Directions to accumulate in excess of statutory period.

Implied directions to accumulate.

Directions to accumulate in excess of the rule against perpetuities.

Destination of income as to the excess—where the gift of the property is immediate—where it is deferred.

Directions to accumulate after present vesting.

Accumulation of rents and profits restricted by statute.

Dispositions of real or personal estate made for the purpose of accumulating the rents and profits and postponing the beneficial enjoyment were formerly subject to no other restriction of time than that prescribed by the rule against perpetuities, common to all executory limitations; and accordingly an accumulation might be directed during the same period as allowed for suspending the vesting (a).

Such dispositions have been subjected to the additional restriction of the statute, 39 & 40 Geo. III. c. 98, which enacts as follows:—"That no person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise however, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for

(a) Dispositions for the accumulation of rents and profits are possible only in dealing with the equitable estate or beneficial interest; being contrary to the rule of the common law applied to legal limitations, that the freehold can never be in suspense. This rule was not followed in equity; and it was considered to be no objection to a trust that it did not vest in any person an actual

equitable estate of freehold, or even any other actual or beneficial interest. See *ante*, p. 140; Butler's note (x) to Fearn, C. R. 537. The law against accumulations has been placed here, in anticipation of its proper place in the section on future equitable limitations, on account of the close connection, as regards the object of the law, with the rule against Perpetuities.

any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or *in ventre sa mère* at the time of the death of such grantor, devisor or testator; or during the minority or respective minorities only of any person or persons who under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce, so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed " (a).

Section 2 provides "that nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler or devisor or other person or persons, or

Proviso as to payment of debts, portions, etc.

(a) This statute, commonly known as the Thelusson Act, was occasioned by the will of Mr. Thelusson. "The law as it stood before the statute had placed no restraint upon the accumulation of property for any period within the rule against perpetuity. In that state of the law, Mr. Thelusson by his will directed his property to be laid out in land, and the rents, profits and income of such land to be accumulated during the lives of all his descendants who should be living at the period of his death, and he then limited the accumulated property in favour of certain of his descendants, who might be living at the determination of the period of accumulation. This

disposition having been upheld by the courts, it was deemed necessary by the legislature to prevent such accumulation for the future." *Per* Turner, V. C., in *Bassil v. Lister*, 9 Hare, 181; 20 L. J. C. 643; see *Thelusson v. Woodford*, 4 Ves. 227; 11 Ves. 112; 1 B. & P. N. R. 357; Butler's note to *Fearnle, C. R.* 436, 539; 1 Jarman on Wills, 264. This statute has hardly ever come before the courts without the judge having occasion to observe upon the inartificial and ill-defined language of its provisions. See *per* Brougham, L. C., 1 M. & Cr. 139, in *Shaw v. Rhodes*; *per* Craunworth, L. C., 6 D. M. & G. 453; 24 L. J. C. 718, in *Tench v. Cheese*.

to any provision for raising portions for any child or children of any grantor, settler or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements" (a).

One only of the statutory periods allowed.

The Act restricts the power of accumulation to one only of the periods mentioned. Accordingly, where a testator gave his residuary estate to the first son of A. who should attain twenty-one, so as to involve an accumulation during the minority of such son, and further directed the trustees of that estate to accumulate the income for twenty-one years from his death; it was held that the accumulation must stop at twenty-one years after his death, although no son of A. had then attained twenty-one, and that the direction to accumulate during the minority of the son was void (b).

Trust to accumulate for period in excess of Act is void only as to the excess.

Trusts and directions to accumulate rents and profits, so far as they exceed the limits allowed by the Act, are void. Thus a trust by will to accumulate during the life of a person named is held good only for the term of twenty-one years from the death of the testator, and stops at the end of that term (c).—So, with a gift to a person upon her marriage with the accumulations of interest from the death of the testator (d).—So, an accumulation of income until a certain sum be raised, or a sum required for a certain purpose, cannot be continued beyond twenty-

(a) As to this proviso, see *Shaw v. Rhodes*, 1 M. & Cr. 135; *Evans v. Hellier*, 5 Cl. & F. 114; *Morgan v. Morgan*, 4 D. & Sm. 164; 20 L. J. C. 109; *Bateman v. Hatchkin*, 10 Beav. 426; *Barrington v. Liddell*, 2 De G. M. & G. 480; 22 L. J. C. 1; *Middleton v. Losh*, 22 L. J. C. 422; *Edwards v. Tuck*, 3 De G. M. & G. 40; 22 L. J. C. 523; *Burt v. Sturt*, 22 L. J. C. 1071; *Tench v. Cheese*, 6 D. M. & G. 453; 24

L. J. C. 716, per Knight Bruce, L. J. And see the cases on the statute collected in Chitty's Statutes.

(b) *Wilson v. Wilson*, 1 Sim. N. S. 288; 20 L. J. C. 365.

(c) *Griffith v. Vere*, 9 Ves. 127; *Elborne v. Goode*, 14 Sim. 165; *O'Neill v. Lucas*, 2 Keen, 313; *Eyre v. Marsden*, 2 Keen, 564.

(d) *Morgan v. Morgan*, 20 L. J. C. 109.

one years (*a*).—And in such cases the term of twenty-one years during which the accumulations may continue commences from the death of the testator, although the accumulations be not directed to commence until a period subsequent to the death (*b*).—A trust by deed to accumulate during the life of a person named is held good only during the life of the grantor and ceases at his death (*c*).

So a trust by will to accumulate until an unborn child attains twenty-one, extending through the period before the birth, is held to stop at twenty-one years from the death of the testator (*d*). A trust to accumulate during the minority only of an unborn child, who when of full age would be entitled to the fund, (the trust not commencing until the birth of the child,) seems to be within the terms of the Act (*e*).—The accumulation by the Court of the income of minors, or rather of their surplus income after providing for maintenance, is independent of the Act, being an exercise of discretion by the Court on behalf of the infant, as to the most advantageous mode of applying the rents of his property (*f*).

Accumulation until unborn child attains twenty-one.

Accumulation of infant's estate.

A trust or disposition of property implying or causing an accumulation, though not in express terms directing such accumulation, is within the statute ;—thus, a charge

Implied directions to accumulate are within the Act.

(*a*) *Shaw v. Rhodes*, 1 M. & Cr. 135 ; *Curtis v. Lukin*, 5 Beav. 147 ; *Oddie v. Brown*, 4 D. & J. 179 ; 28 L. J. C. 542.

(*b*). *Webb v. Webb*, 2 Beav. 493 ; *Att.-Gen. v. Poulden*, 3 Hare, 555. The term is exclusive of the day of his death. *Gorst v. Lowndes*, 11 Sim. 434.

(*c*) *Rosslyn's Trusts*, 16 Sim. 391.

(*d*) *Longdon v. Simson*, 12 Ves. 295 ; *Haley v. Bannister*, 4 Madd. 275 ; *Ellis v. Maxwell*, 3 Beav. 587 ; *Edwards v. Tuck*, 3 D. M. & G. 40 ; 22 L. J. C. 523 ; *Tench v. Cheese*, 6 D. M. & G. 453 ; 24 L. J. C. 716.

(*e*) See *Ellis v. Maxwell*, *supra*.

(*f*) See *per Eldon*, L. C., in *Griffiths v. Vere*, 9 Ves. 136. "Accumulation there has a different meaning from accumulation directed while the enjoyment of the property is in suspense. In the case of property coming to an infant, accumulation is only that which, if it were not the case of an infant, the owner might do for himself. If the property comes to an infant, the infant has no will to say, whether it shall be spent or accumulated ; and, therefore, the court expresses its will for the infant, and says that is the most advantageous way of applying the rents for him." *Per Cranworth*, L. C., in *Tench v. Cheese*, *supra*. See 1 Jarman on Wills, 268.

of a certain sum to be raised out of the annual rents and profits, the distribution of which is postponed until the sum is raised, is, in effect, a trust or direction to accumulate, and cannot be continued beyond the period allowed by the Act (a).—An executory devise, if made in such terms as to include the income until vesting; or a future residuary disposition, as it carries the intermediate income if not otherwise disposed of, involves an accumulation, and is within the Act (b).

Powers of maintenance and advancement out of income.

Where the property was directed by will to be accumulated for the ultimate benefit of certain objects, with powers of maintenance and advancement out of the income, the powers, as disposing of the income, were held to continue and to be capable of exercise, notwithstanding they extended beyond the period allowed for accumulating the income (c).

Trust to pay premiums on policy.

A trust to pay the premiums upon a policy of insurance during the life of a person out of the income of property is not an accumulation of such income within the Act; it is an absolute disposal of it in consideration of the payment to be made in a certain event under the policy (d).

Directions to accumulate in excess of the rule against perpetuities void.

A trust or direction for accumulation which infringes the rule against perpetuities, as directing accumulation for an indefinite period, or a period extending beyond the time allowed by that rule, or as disposing of the accumulations by limitations too remote, is void altogether, independently of the above statute, and is not apportionable as to the time of accumulation; as a proviso in a

(a) *Shaw v. Rhodes*, 1 M. & Cr. 135; *Evans v. Hellier*, 5 Cl. & F. 114; see 1 Jarman on Wills, 274.

(b) 1 Jarman on Wills, 276; *M'Donald v. Bryce*, 2 Keen, 276; *Morgan v. Morgan*, 4 D. & Sm. 164; 20 L. J. C. 109, 441; see *Tench v. Cheese*, 6 D. M. & G. 453; 24 L. J. C. 716, where Cranworth, L. C., said, "If a testator directs that to be done which, as a conse-

quence, leads to an indefinite accumulation, he must within the meaning of the statute be taken to have directed accumulation." But as to an accidental accumulation, see *Corporation of Bridgnorth v. Collins*, 15 Sim. 538.

(c) *Pride v. Fooks*, 2 Beav. 430.

(d) *Bassil v. Lister*, 9 Hare, 177; 20 L. J. C. 641.

settlement that during the minorities of any persons becoming successively entitled in possession under the settlement, the trustees shall receive and accumulate the rents and profits (a). Where a testator created a long term of years upon trust to raise and accumulate an annual sum for the purpose of paying the mortgage debts charged upon the land, it was held that the trust, though not limited in duration, was valid, because the power of the owner of the inheritance, subject only to the mortgages, was not thereby restricted (b).

Where there is an absolute and immediate disposition of the property, subject only to a direction for accumulation during an excessive period, the statute in stopping the accumulation beyond the period allowed leaves the disposition of the property discharged from the direction, and entitles the grantee or devisee to the immediate income or possession (c).

Destination of income, as to excess.—Where there is an immediate gift of the property.

Where the accumulation is directed for an excessive period, and there is no disposition of the property until the expiration of that period, the statute in stopping the accumulation beyond the period allowed does not accelerate the disposition; but the effect is to withdraw the subsequent income from the disposition of the rest of the property. The subsequent income until the disposition takes effect will then pass under the residuary disposition in the will;—or, if the disposition from which such income is withdrawn be a residuary disposition, it will pass as undisposed of,—either to the next of kin, or to the

Where the gift is deferred.

(a) See *ante*, p. 457. *Lord Southampton v. Marq. Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Swanst. 432; *Palmer v. Holford*, 4 Russ. 403; *Browne v. Stoughton*, 14 Sim. 369; *Scarisbrick v. Skelmersdale*, 17 Sim. 187; *Turvin v. Newcombe*, 3 K. & J. 16.

(b) *Bateman v. Hotchkiss*, 10 Beav. 426, and the trust was held

to be within the exception of the Act restraining accumulations, being a provision for the payment of debts. See *ante*, p. 366, and see *Bacon v. Proctor*, T. & R. 31; *Briggs v. Earl of Oxford*, 1 D. M. & G. 363; 21 L. J. C. 829; *Tewart v. Lawson*, 43 L. J. C. 673; L. R. 18 Eq. 490.

(c) 1 Jarman on Wills, 270; *Trickey v. Trickey*, 3 M. & K. 560.

heir, according to the nature of the property (*a*).—Where a testator devised to trustees upon trust to accumulate the rents until the youngest child of A. attained twenty-one, it was held that the interest of the heir, becoming entitled to the undisposed of rents accruing after twenty-one years from the testator's death until the youngest child should attain twenty-one, was a chattel interest which upon his death passed to his personal representatives (*b*). A trust to invest the accumulations of income of property in the purchase of land, does not attach upon the income during the period of excess, and such portion of the income passes according to the original nature of the property (*c*).

direction to accumulate after present vesting.

Where property becomes presently and absolutely vested in a person who is *sui juris*, although it be subject to a trust or direction for accumulation beyond the time of vesting and be directed to be paid at a future period, he is not obliged to let the accumulations continue, but may claim to have the property transferred to him in immediate possession (*d*).—In the case of a charity taking a gift, subject to a direction to accumulate the income, the charity was held not entitled to present possession on account of the fluctuating character of the beneficiaries (*e*).

(*a*) 1 Jarman on Wills, 271; *Crawley v. Crawley*, 7 Sim. 427; *O'Neill v. Lucas*, 2 Keen, 313; *Ellis v. Maxwell*, 3 Beav. 587; *McDonald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, 2 Keen, 564; *Elborne v. Goode*, 14 Sim. 165; *Tench v. Cheese*, 6 D. M. & G. 453; 24 L. J. C. 716. As to the further income of the accumulations already made until the period of vesting, see *Morgan v. Morgan*, 20 L. J. C. 441.

(*b*) See *ante*, p. 45, 197; *Sewell v. Denny*, 10 Beav. 315.

(*c*) *Simmons v. Pitt*, L. R. 8 Ch. 978; 43 L. J. C. 267. See *Earl of Bective v. Hodgson*, 33 L. J. C. 601.

(*d*) *Saunders v. Vautier*, 4 Beav. 115; *Curtis v. Lukin*, 5 Beav. 147; *Bateman v. Hotchkin*, 10 Beav. 426; *Hilton v. Hilton*, L. R. 14 Eq. 468, 475. See *ante*, p. 452.

(*e*) *Harbin v. Masterman*, L. R. 12 Eq. 559, 40 L. J. C. 760.

SECTION VI. FUTURE EQUITABLE ESTATES AND INTERESTS IN LAND.

- § 1. The limitation of future equitable estates and interests.
- § 2. Priority of estates and interests in equity.
- § 3. Protection of the legal estate.
- § 4. The doctrine of notice.
- § 5. Tacking and consolidating mortgages ; Marshalling.

§ 1. THE LIMITATION OF FUTURE EQUITABLE ESTATES AND INTERESTS.

Future equitable estates corresponding to legal estates—remainder and reversion—limitation of freehold *in futuro*—in defeasance of prior estate—powers.

The rule against perpetuities—accumulations.

Contingent limitations of equitable estates—vesting of intermediate interest.

The rule in *Shelley's* case applied to equitable limitations.

Future charges upon land of portions, legacies, etc.—construction of charges as vested or contingent—charges upon personality—charges upon both real and personal estate.

Charge of portions subject to advancement—presumption against double portions.

Equitable estates and interests in land have been distinguished into those corresponding with legal estates and those peculiar to equity, having no analogy with legal estates (*a*).

In the limitation of equitable estates, corresponding with legal estates, future estates and interests are, in general, limited in the same manner, and the same language is used and receives the same construction, as in limiting future legal estates ;—according to the principle that equity follows the law. Accordingly, the equitable estate may be limited for a particular estate with re-

Future equitable estates corresponding with legal estates.

Remainder and reversion.

See *ante*, p. 243.

mainder, or with successive remainders, or leaving a reversion, as at law (*a*).

But the limitation of the trust or equitable estate is free from the restrictive rules peculiar to the quality of freehold tenure; for these rules are satisfied in their application to the legal estate of the trustee and have no ulterior effect on the beneficial interest. The rule of common law that the freehold cannot be in abeyance, with all its consequences in legal limitations, has no application in equity. Therefore, an equitable estate, freehold in quantity, may be limited to commence at a future time, or upon the happening of a future event, without any preceding freehold estate to support it as a remainder (*b*).

Limitation of
freehold in
futuro.

Limitations in
defeasance of
prior estate.

So an equitable estate may be limited to take effect in defeasance or substitution of a preceding estate without awaiting its determination, in the same manner as a shifting use or executory devise (*c*).—The trust or equitable interest in leaseholds or terms of years may be limited with all the freedom of an executory bequest of personal estate (*d*).

Powers of ap-
pointment.

Equitable estates may also be appointed under powers given for that purpose, analogous to and, so far as the quality of the estate permits, governed by the same rules as powers of appointing uses or powers under wills (*e*).

Rule against per-
petuity applied
to equitable
limitations.

Future limitations of the trust or equitable estate are subject to the same rule against perpetuities as future legal limitations by way of springing use and executory devise, and the rule is applied according to the same principles. “It may be laid down without any qualification that no nearer approach to a perpetuity can be made

(*a*) See *ante*, pp. 139, 243.

(*b*) See *ante*, p. 140.

(*c*) See *ante*, pp. 140, 350, 360.

(*d*) See *ante*, p. 321; and see

Holmes v. Prescott, 33 L. J. C. 264.

(*e*) See *ante*, p. 374; Sugden on Powers, 45, 8th ed.

through the medium of a trust, or will be supported by a court of equity, than can be made by legal conveyances of legal estates or interests or will be admitted in a court of law" (a).

By means of a trust or direction for that purpose the rents and profits of land may be withdrawn from present ownership and accumulated for the benefit of a future and uncertain owner. Such dispositions were impossible at the common law on account of the rule that the freehold could never be in suspense. Trusts and directions to accumulate rents and profits for future disposition are subject to the rule against perpetuities; and they are subject to further restriction by the Statute 39 & 40 Geo. III. c. 98, already noticed (b).

Trusts for accumulation.

The rules restrictive of contingent remainders at the common law have no application in equity. A contingent limitation of the equitable estate, though in the form of a contingent remainder at law, may take effect as and when it is limited to arise, subject only to the rule against perpetuities. It is not affected by the determination of the preceding estate before the happening of the contingency upon which it depends (c). Thus under a trust for A. for life and after his death for the children of A. who should attain twenty-one, the trust for the children will not fail by reason of A. dying before any child has attained that age, as would be the case with a contingent remainder at law in the same terms (d). So under a trust for A. for life and after his death to the children of B., the trust for the children of B. does not fail upon the death of A. before children of B. exist (e).

Contingent limitations of equitable estates.

(a) Butler's note to Co. Lit. 290 b, s. xiv.; see *ante*, p. 440.

(b) See *ante*, p. 462.

(c) Fearne, C. R. 303, 321; *Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. C. 316; see *Umbers v. Jaggard*, L. R. 9 Eq. 200.

(d) *Eddel's Trusts*, *supra*; *Holmes v. Prescott*, 33 L. J. C. 264; *Best v. Donmall*, 40 L. J. C. 160.

(e) *Chapman v. Blisset*, Cas. t. Talb. 145, and see 2 Jarman on Wills, 88. As to executory devises to children, see *ante*, p. 370.

Intermediate interest until vesting of contingent limitation.

If a contingent limitation be made without any preceding estate, or if a contingent limitation do not vest until after the determination of the preceding estate, the intermediate interest, unless otherwise disposed of, results to the settlor or his heir, or falls into the residue of his estate (a).

The rule in *Shelley's case* applied to equitable limitations.

The rule in *Shelley's case*, by which limitations in the form of remainders to the heirs or to the heirs of the body, after an estate of freehold in the ancestor, are referred to the estate of the ancestor, is applied by analogy in construing the like limitations of equitable estates, and upon the same principles upon which it is applied to legal limitations (b).

Limitations partly equitable and partly legal.

But it can be applied only where the limitations to the ancestor and to the heirs are homogeneous, either both legal or both equitable; if the estate limited to the ancestor is equitable and the remainder to the heirs is legal, or conversely, the rule is not applicable (c).

Legal limitation subject to trust.

Where both the limitations are legal, a trust imposed upon one of them does not prevent the application of the rule to the legal limitations; for a court of law, in construing legal limitations, takes no notice of trusts (d).

(a) See *ante*, p. 363; Fearn, C. R. 545, 546. *Eddel's Trusts*, L. R. 11 Eq. 559; 40 L. J. C. 316; see *Best v. Donmall*, 40 L. J. C. 160. *Bective v. Hodgson*, 10 H. L. C. 656; 33 L. J. C. 601, where see the different rule stated as to personalty; "If by a will the whole of the personal estate or the residue of the personal estate be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must during the period which the law allows for accumulation be accumulated and added to the principal." *Per Westbury*, L. C., lb. 602. See *Holmes v. Prescott*, 33 L. J. C. 264, where the intermediate income of personalty,

settled by reference to the limitations of realty involving a contingent limitation, was held to follow the rents of the realty.

(b) *Wright v. Pearson*, 1 Eden, 119; *Philips v. Brydges*, *Brydges v. Brydges*, 3 Ves. 120; *Webb v. Earl of Shaftesbury*, 3 M. & K. 599; *Jackson v. Noble*, 2 Keen, 590. See the rule stated and applied, *ante*, p. 342.

(c) See Fearn, C. R. 52, 58. See *Curtis v. Price*, 12 Ves. 89; *Nash v. Coates*, 3 B. & Ad. 839; *Quested v. Michell*, 24 L. J. C. 722; *Cooper v. Kynoch*, 41 L. J. C. 296; L. R. 7 Ch. Ap. 298; *Baker v. Parson*, 42 L. J. C. 228.

(d) Fearn seems to have been of a contrary opinion, see C. R. 35;

But the rule in *Shelley's* case is not applied in construing *executory trusts*, which have to be carried out by a conveyance or settlement to be framed according to certain directions, where an application of the rule to the literal terms of such directions would defeat the intended purpose of the trust. As in marriage articles or a devise by will directing that a settlement be made to a person for life with remainder to the heirs of his body, (limitations which in their technical meaning according to the rule in *Shelley's* case would make him tenant in tail in possession with an absolute power over the property,) the trust is executed by a strict settlement, with limitations to the person for life with remainders to his first and other sons successively in tail (*a*).

Application of the rule to executory trusts.

Trusts for conversion, charges of money for portions, legacies, debts, etc., constituting equitable interests in land of a kind peculiar to equity, and having no correspondence with legal estates (*b*), may also be limited to take effect at a future time or upon the happening of some event or contingency, subject only to the rule against perpetuities.

Future charges upon land, of portions, legacies, etc.

With charges of money on land, whether by deed as portions in settlements, or by will as legacies, it is a rule of construction as to the vesting of the charge, that a direction for payment at some future time or event, having reference to the condition or circumstances of the legatee or portioner, as at the age of twenty-one or on marriage, is to be construed as deferring the vesting; so that if the legatee or portioner die before the time, the land is discharged, unless an intention to the contrary appear in the will or instrument. And the gift of interest on the sum in the meantime for maintenance or otherwise is held not

Charge to be paid at a certain age or other event affecting the person.

but see Butler's note (p) *Ib.*; and see 2 Jarman on Wills, 245; *Douglas v. Congreve*, 1 Beav. 59.

(*a*) Fearne, C. R. 90, 114; 2 Jarman on Wills, 252; notes to

Lord Glenorchy v. Bosville, 1 W. & T. L. C. 21; and see as to executory trusts, *ante*, p. 245.

(*b*) See *ante*, pp. 243, 248.

to be sufficient to show an intention to the contrary.—
 But if the payment be postponed to a time or event, having reference merely to the condition or convenience of the property, as the death of a tenant for life, and having no reference to the personal condition of the legatee or portioner, the effect of such direction is restricted to the purpose manifestly intended, and it does not affect the vesting (*a*).

Charge to be paid upon death of tenant for life or other event affecting the property.

With charges on personal estate a different rule prevails,—a direction for payment at a future time does not alone defer the vesting; and if the legatee or portioner die before the time of payment his representatives become entitled, notwithstanding the payment be postponed, unless an intention appear to the contrary (*b*).

Charges on personally payable at a future time.

This rule of construction is applied to charges on terms of years and leaseholds (*c*);—and to charges on the proceeds of land under trust for conversion (*d*).

Charge on leasehold and proceeds of conversion.

But if the legacy or portion itself, and not merely the payment of it, be expressed to be at some future time or event having reference to the person, as “if” or “when”

(*a*) “In regard to sums payable out of land *in futuro*, the old rule was that whether charged on the real estate primarily, or in aid of the personalty, they could not be raised out of the land, if the devisee died before the time of payment; but this doctrine has undergone some modification and the established distinction now is” that above stated. The rule was founded on the principle of favouring the inheritance. 1 Jarman on Wills, 756; Butler’s note (1) to Co. Lit. 237 *a*; and note (*g*) to Fearn, C. R. 552; Hawkins on Wills, 234; see *Remnant v. Hood*, 2 D. F. & J. 336; 30 L. J. C. 71; *Parker v. Hodgson*, 1 Dr. & Sm. 568; 30 L. J. C. 590.

(*b*) 1 Jarman on Wills, 759; Hawkins on Wills, 226; *Lister v. Bradley*, 1 Hare, 12; *re Bartholomew*, 1 Mac. & G. 354. The above difference between real and personal

estate “has arisen from the application to the latter of doctrines borrowed from the civil law, which have not obtained in regard to real estate, having been introduced by the Ecclesiastical Courts, who possessed, in common with courts of equity, a jurisdiction for the recovery of legacies and distributive shares of personal estate. Pecuniary legacies charged on land are, so far as they come out of the real estate, to be considered as dispositions *pro tanto* of that species of property.” 1 Jarman on Wills, 755; see 2 Spence, Eq. Jur. 395; and see *per Kindersley*, V. C., *Parker v. Hodgson*, 1 Dr. & Sm. 568; 30 L. J. C. 590.

(*c*) *Re Hudsons*, 1 Drury, 6.

(*d*) *Hart’s Trusts*, 3 D. & T. 195; 28 L. J. C. 7; see *Spencer v. Wilson*, L. R. 16 Eq. 501; 42 L. J. C. 754.

he attains twenty-one, or “at”, or “upon”, or “after” attaining twenty-one; or where the only words of gift consist in a direction to pay to children, etc., when they attain, or at, or upon, or after attaining twenty-one, there being no other terms from which vesting could be implied, it is deferred until the time of payment, and is contingent upon attaining the age mentioned (a).—So, a direction to pay a legacy to a person upon her marriage is a contingent gift which is not vested until marriage (b).

Future and contingent legacy or portion.

The gift of the interest until the time appointed, in the case of personalty, presumptively vests the principal; unless it be given by way of accumulation at the same time as the principal, in which case it affords no such presumption (c).

Gift of interest presumptively vests principal.

As a charge upon real estate, it makes no difference whether the legacy or portion be given to the person in the terms above mentioned as “at twenty-one”, or whether it be given to him in absolute terms in the first instance and then adding “payable at twenty-one”; it is equally considered to be contingent upon attaining the age mentioned (d).

In consequence of the above distinction in the effect of a direction for future payment upon the vesting of charges, as operating upon real or personal estate, it may happen that a legacy originally charged both on real and personal estate may fail as against the real estate by reason of the death of the legatee before the time of payment, but

Charge upon both real and personal estate.

(a) 1 Jarman on Wills, 760, 762; Hawkins on Wills, 223; *Hanson v. Graham*, 6 Ves. 239; *Leake v. Robinson*, 2 Mer. 363; *Locke v. Lamb*, L. R. 4 Eq. 375; *Kidman v. Kidman*, 40 L. J. C. 359; *Spencer v. Wilson*, L. R. 16 Eq. 501; 42 L. J. C. 754. “A leading distinction is, that if futurity is annexed to the substance of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests *instantly*.” 1 Jarman

on Wills, 759.

(b) *Morgan v. Morgan*, 4 D. & Sm. 164; 20 L. J. C. 109.

(c) 1 Jarman on Wills, 766; Hawkins on Wills, 227; see *Morgan v. Morgan*, supra; *Hart's Trusts*, 3 D. & J. 195; 28 L. J. C. 7; *Simpson v. Peach*, L. R. 16 Eq. 208; *Peek's Trusts*, L. R. 16 Eq. 221; 42 L. J. C. 422.

(d) *Per Kindersley, V. C. Parker v. Hodgson*, 1 Dr. & Sm. 568; 30 L. J. C. 590.

remain a charge upon the personalty ; as in the case of a legacy given to a person and made payable at twenty-one, and the legatee dying under twenty-one (a).

Portions charged subject to satisfaction by advancement.

Portions charged in settlements of land to be raised upon the death of the parents are usually made subject to an express proviso that an advancement made by the parents in their lifetime shall be taken in satisfaction, unless expressly declared not to be so intended (b). Under such a proviso a devise or bequest by will of the parent would not, in general, operate as an advancement in his lifetime in satisfaction of the portion (c).

Presumption against double portions.

Where the settlement of the portions is made by a parent, or one who stands *in loco parentis* to the portioners, and there is no express provision relative to satisfaction by advancement or otherwise, there is a general presumption of equity against double portions, and in favour of satisfaction by an advancement ; which, however, is capable of being rebutted by the nature and circumstances of the advancement. Where the settlor is a stranger to the portioners there is no such presumption, and the effect of an advancement is strictly a question of construction (d).

(a) Hawkins on Wills, 236 ; *Pearce v. Loman*, 3 Ves. 135 ; *Parker v. Hodgson*, 1 Dr. & Sm. 568 ; 30 L. J. C. 590.

(b) See 2 Prideaux Conv. 284, 7th ed. ; 2 Hayes Convey. 63, 5th ed. ; 2 W. & T. L. C. 356 notes to *Ex p. Pye*.

(c) *Cooper v. Cooper*, L. R. 8 Ch. 813 ; 43 L. J. C. 158, explaining the cases of *Twisden v. Twisden*, 9 Ves. 413, and *Leake v. Leake*, 10 Ves. 477, supposed to have decided to the contrary.

(d) 2 W. & T. L. C. 354, notes to *Ex p. Pye*.

§ 2. THE PRIORITY OF ESTATES AND INTERESTS IN EQUITY.

Priority of estates and interests in equity.

Priority of acquisition gives prior equity.

Priority lost by fraud or negligence.

Negligence as to the custody of title deeds—trusting to representations as to the deeds.

Trustee depositing deeds in breach of trust.

Vendor signing receipt for purchase money.

Priority by notice to trustee of equitable interest in personalty or money charged upon land—no priority in equitable estates in land by notice to trustee—notice upon change of trustees.

Estates and interests may be created in the same property not in a prescribed series of limitations, but upon various and independent occasions; and questions may then arise as to their priority or relative times of taking effect which cannot be determined merely by construction of the terms of limitation, but are to be decided by the rules and principles of equity.

Priority of estates and interests in equity.

For example, the equity of redemption in mortgaged land may be mortgaged or charged successively to two persons, between whom may consequently arise a conflict of claims to priority (a).—An interest in the proceeds of real estate under a trust for conversion, or a charge to be raised by sale or mortgage may be assigned to two persons successively, thereby raising a question of priority (b).—A purchaser of land, having taken a conveyance subject to a lien or charge of the vendor for unpaid purchase money, may sell or charge the same land in favour of a third person, and a conflict of claims may thus arise

Examples.

(a) *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare, 14; see *Phillips v. Phillips*, 31 L. J. C. 325.
(b) See *Lee v. Howlett*, 2 K. & J. 531; *Hughes' Trusts*, 2 H. & M. 89; 33 L. J. C. 725.

between the vendor and the subsequent incumbrancer (a).
—A trustee by his dealings with the trust property may raise a conflict of equities with the *cestui que trust* (b).

Priority of acquisition gives prior equity.

The general rule of equity as to the priority of estates and interests created or arising on different occasions in the same subject of property is that they rank in order of the time of acquisition.—“Every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate, the legal estate being outstanding, makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser; he can only grant to the purchaser that which he has, namely, the estate subject to the annuity or mortgage, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities, and the maxim applies, *qui prior est in tempore potior est in jure*.—And it is quite immaterial whether the subsequent incumbrancers at the time they took their securities and paid their money had notice of the first incumbrance or not” (c).

(a) *Rice v. Rice*, 2 Drew. 73; 23 L. J. C. 289; see *ante*, p. 305.

(b) *Newton v. Newton*, L. R. 6 Eq. 135; 4 Ch. 143; 38 L. J. C. 145; *Dance v. Goldingham*, L. R. 8 Ch. 902; 42 L. J. C. 777; *Stackhouse v. Countess Jersey*, 1 J. & H. 721; 30 L. J. C. 421.—It may here be noticed with reference to transactions of the kinds above mentioned that the fraudulent concealment of any deed or instrument material to the title, or any incumbrance, from the purchaser by a seller or mortgagor or his solicitor or agent has been made a misde-

meanour by statute. 22 & 23 Vict. c. 35, s. 24. See *post*, p. 511.

(c) *Per* Westbury, L. C., *Phillips v. Phillips*, 31 L. J. C. 321, 325. See *per* Selborne, L. C., *Dixon v. Muckleston*, 42 L. J. C. 213; L. R. 8 Ch. 155, citing Turner, L. J., in *Cory v. Eyre*, 1 D. J. & S. 167. See the rule stated and explained that the assignee of an equity is bound by all the equities affecting it. Lewin on Trusts, 453, 4th ed.; and see *post*, p. 491; as to the protection afforded by the legal estate, see *post*, p. 485.

The priority in equity due to priority of acquisition may be rebutted and lost by circumstances of fraud, misrepresentation, or negligence in the conduct of the prior claimant relatively to the subsequent claimant.—“A court of equity will not prefer the one to the other on the ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all respects equal; and if the one has on other grounds a better equity than the other, priority of time is immaterial. In examining into the relative merits or equities of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: the nature and condition of their respective equitable interests; the circumstances and manner of their acquisition; and the whole conduct of each party with respect thereto” (a). Priority lost by fraud or negligence.

But no preference in equity arises from the mere form of the instrument or mode by which the estate or interest is created. “A better equity is where a second incumbrancer, without notice, takes a protection against a subsequent incumbrancer, which the prior incumbrancer has neglected to take;” as by giving notice to the trustee, where such notice is effectual to secure the priority (b).

A mortgagee who negligently omits to get his security perfected and leaves the title deeds in the possession of the mortgagor, who is thereby enabled to raise another mortgage upon deposit of the deeds, loses his priority as against the second mortgagee.—“*Primâ facie* a mortgagee who knowing that his mortgagor has title deeds, omitted to call for them or to make any inquiry on the Negligence as to the custody of title deeds.

(a) *Per* Kindersley, V. C., in *Rice v. Rice*, 2 Drew. 73; 23 L. J. C. 291; approved in *Hunter v. Walters*, L. R. 11 Eq. 312; and see *per* Giffard, V. C., in *Thorpe v. Holdsworth*, L. R. 7 Eq. 146; 38

L. J. C. 194.

(b) *Foster v. Blackstone*, 1 M. & K. 297; S. C. nom. *Foster v. Cockerell*, 3 Cl. & F. 456. As to effect of notice given to the trustee, see *post*, p. 482.

subject, must be considered guilty of such negligence as to make him responsible for the frauds he thus enabled his mortgagor to commit" (a).

Negligence in giving back possession of deeds.

So, if a mortgagee negligently give back the title deeds to the mortgagor for any purpose, who in fraud of that purpose raises another mortgage upon them, the original mortgagee is postponed. Thus, where a mortgagee allowed the mortgagor to have possession of the deeds upon the representation that he wanted them to complete a sale, and never applied for them for many years, during which time the mortgagor raised money upon them, the first mortgagee was postponed to the subsequent charges (b).—Where a mortgagee allowed the mortgagor to have possession of the deeds for the purpose of raising a certain sum in priority to his mortgage, and the mortgagor raised a much larger sum, it was held, that the original mortgage must be postponed to the whole amount raised (c).—Where the mortgagee gave back the deeds to the mortgagor to enable him to raise a second mortgage, and the mortgagor raised a mortgage without giving notice of the prior one, it was held that the original mortgagee lost his priority (d).

Possession of deeds unexplained.

The mere fact of the deeds getting back into the possession of the mortgagor, unexplained, is not alone sufficient to postpone the first mortgagee; and it lies upon the second mortgagee to prove a case of fraud or negligence against him.—“The doctrine at last is, that the mere cir-

(a) *Per* Cranworth, L. C., in *Colyer v. Finch*, 5 H. L. C. 905; 26 L. J. C. 65; *Layard v. Maud*, L. R. 4 Eq. 397; 36 L. J. C. 669.

(b) *Waldron v. Stoper*, 1 Drew. 193; see *Dowle v. Saunders*, 2 H. & M. 242; 34 L. J. C. 87, where the solicitor of the mortgagee returned the deeds to the mortgagor for a special purpose without the consent of his client, and was held responsible.

(c) *Perry Herriack v. Attwood*, 2 D. & J. 21 27 L. J. C. 121. “If

a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or through fraud, but intentionally to enable him to raise a sum of £15,000, which should take precedence, the mortgagee cannot complain if instead of £15,000 he raises £50,000, because he puts it in his power to raise any sum of money he pleases.” *Per* Cranworth, L. C., *Ib.*

(d) *Briggs v. Jones*, L. R. 10 Eq. 92.

cumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee" (a).

Where a mortgagee advances money upon the deeds of an estate, honestly trusting to the representations of the mortgagor that all the deeds are deposited, but some are in fact kept back, and the mortgagor obtains an advance upon them from another person, there is no such negligence in the first mortgagee as to deprive him of priority (b).

Trusting to representations as to the deeds.

Where a trustee, having the legal custody of the title deeds in right of his trust, deposits them, in breach of trust, as security for an advance to himself, the *cestui que trust*, if not guilty of any negligence in the matter, as having the prior equity, is preferred (c).—If the *cestui que trust* has improperly intrusted the trustee with the deeds or *indicia* of property upon which the latter has created the charge, he would be postponed (d).

Trustee depositing title deeds in breach of trust.

As between a vendor having a lien for unpaid purchase money and a mortgagee from the purchaser, the vendor

Vendor signing receipt for purchase money.

(a) *Per Eldon, L. C.*, 6 Ves. 190, *Evans v. Bicknell*; *Allen v. Knight*, 5 Hare, 272; 16 L. J. C. 370; 11 Jur. 527.

(b) "When the court is satisfied of the good faith of the person who has got a prior equitable charge, and is satisfied that there has been a positive statement, honestly believed, that he has got the necessary deeds,—then he is not bound to examine the deeds, and is not bound by constructive notice of their actual contents, or of any deficiencies which by examination he might have discovered in them. This I take to be the law even in cases where the depositor of the deeds is himself acting in the double character of borrower of the depositor's money and of solicitor

for the depositor." *Per Selborne, L. C.*, in *Dixon v. Muckleston*, L. R. 8 Ch. 161; 42 L. J. C. 210; *Roberts v. Croft*, 2 D. & J. 1; 27 L. J. C. 220; *Hunt v. Elmes*, 2 D. F. & J. 578; 30 L. J. C. 255; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; 40 L. J. C. 147, 777, where the later mortgagee obtained the legal estate, as to the effect of which see *post*, p. 485.

(c) *Baillie v. McKewan*, 35 Beav. 177; *Stackhouse v. Countess Jersey*, 1 J. & H. 721; 30 L. J. C. 421; *Newton v. Newton*, L. R. 6 Eq. 135; 4 Ch. 143; 38 L. J. C. 145.

(d) *R. v. Shropshire Union Co.*, L. R. 8 Q. B. 420; 42 L. J. Q. B. 193; and see *Mangles v. Dixon*, 1 Mac. & G. 437; 3 H. L. C. 702.

who had executed a conveyance acknowledging the payment of the money both in the body of the deed and by a receipt indorsed, and had delivered over the title deeds, was held to be estopped from setting up his lien in priority to the mortgagee, who had lent money upon a deposit of the deeds (a).—Signing such receipt is a representation that the money has been paid and that the purchaser has a good title both at law and in equity; and it binds the person signing as against all persons taking the property upon the faith of such representation (b).

Priority by
notice to trustee.

If the subject of property be of the nature of personal chattels, which pass at law by delivery of possession, the priority of an assignee or person acquiring an equitable interest depends upon giving notice of his interest to the trustee, which is necessary to change his possession to that of trustee for the assignee; and until such notice be given a subsequent assignee for value without notice of the prior assignment may secure priority by giving notice to the trustee. So with *choses in action*, to preserve the analogy with chattels in possession, the same doctrine is applied and notice is necessary to perfect the assignment.—“The act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice” (c).

(a) *Rice v. Rice*, 2 Drew. 73; 23 L. J. C. 291; *White v. Wakefield*, 7 Sim. 401, though he remained in possession as tenant to the purchaser.

(b) *Rice v. Rice*, *supra*; *Hunter v. Walters*, L. R. 11 Eq. 292; 7 Ch. 75; 41 L. J. C. 175. As to a receipt in an unusual form or place, see *Kennedy v. Green*, 3 M. & K. 699; and see *post*, p. 496.

(c) *Per Lyndhurst*, L. C., in *Loveridge v. Cooper*, 3 Russ. 58; *Dearle v. Hall*, 3 Russ. 1; see the

notes to *Ryall v. Rowles*, 2 W. & T. L. C. 722; *Bridge v. Beadon*, L. R. 3 Eq. 664; 36 L. J. C. 651.—Notice is also necessary to secure priority against the claim of a trustee in bankruptcy to all goods and chattels in the order and disposition of the bankrupt. But the Bankruptcy Act, 1869, has excepted *things in action* other than trade debts. *Ryall v. Rowles*, 2 W. & T. L. C. 670; see *Ex. p. Union Bank of Manchester*, L. R. 12 Eq. 354; *Ex. p. Kemp*, L. R. 9 Ch. 383.—The

Accordingly upon an assignment of an interest in the proceeds of real estate under trust for sale and conversion, or in a charge to be raised by sale or mortgage, being of the nature of a personal chattel, the assignee must give notice to the trustee to secure his priority over other claims (a). Notice required upon assignment of money charged upon land.

But equitable estates and interests in the land corresponding to legal estates, though the legal estate be vested in a trustee, follow the analogy of legal estates; and their priority is independent of notice to the trustee and is subject to the general rule of priority of acquisition.—“At law the rule clearly is that different conveyances of the same tenement take effect according to their priority in time. If a man seised in fee first grants one term of years and then another term, the second termor cannot enter till the first term has ceased by effusion of time, surrender or otherwise. So, if freehold interests are carved out of the fee by different conveyances, the estate of the second grantee cannot take effect in possession till the estate of the first has in some manner ceased.—Equity follows the law; and where the legal estate is outstanding conveyances of the equitable interest are construed and treated, in a court of equity, in the same manner as conveyances of the legal estate are construed and treated at law” (b). Notice not required for equitable estates in land.

Thus, with the equity of redemption of a legal mortgage, as between successive mortgagees, no priority is No priority by notice to legal mortgagee.

trustee in bankruptcy must also give notice in order to preserve his priority against a subsequent purchaser for value without notice of the bankruptcy. *Stuart v. Cockereil*, L. R. 8 Eq. 607; 39 L. J. C. 127; *re London and Provincial Telegraph Co.*, L. R. 9 Eq. 653; 39 L. J. C. 419; see *Ex p. Caldwell*, L. R. 13 Eq. 188.—By the Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25 (6), an assignment in writing, with notice in writing, of any debt or legal chose

in action is made effectual in law to transfer the legal right and all the legal remedies for the same.

(a) *Foster v. Blackstone*, 1 M. & K. 297; S. C. nom. *Foster v. Cockereil*, 3 Cl. & F. 456; see *Wilmot v. Pike*, 5 Hare, 14; *Lee v. Howlett*, 2 K. & J. 531; *Hughes' Trusts*, 2 H. & M. 89; 33 L. J. C. 725.

(b) *Per Shadwell*, V. C., 8 Sim. 642, *Jones v. Jones*; and see the cases there cited. See *per Langdale*, M. R., 5 Hare, 20, in *Wilmot v. Pike*.

acquired by a notice given to the first mortgagee of the legal estate; but they are entitled in order of time, notwithstanding such notice given (*a*).—The same rule applies to a leasehold estate and to other chattel interests in land (*b*).

Notice upon
change of
trustees.

Upon a change of trustees, it is not the duty of the new trustees, nor is it the practice of the court, to inquire respecting notices given to the old trustees, nor are the new trustees affected by such notices (*c*). Notice to one of joint trustees is sufficient; but upon his death it does not survive with the property to the others (*d*). And notice to one of the trustees is sufficient, although he be at the same time interested in the property, and might by concealing the notice make a subsequent assignment (*e*).

(*a*) See *ante*, p. 301. *Jones v. Jones*, 8 Sim. 633; *Wilmot v. Pike*, 5 Hare, 14; see *Peacock v. Burt*, 4 L. J. C. 73, also reported in Coote on Mortgages, App.

(*b*) *Wiltshire v. Rabbits*, 14 Sim. 76.

(*c*) *Phipps v. Lovegrove*, L. R. 16 Eq. 80; 42 L. J. C. 892.

(*d*) *Meux v. Bell*, 1 Hare, 73.

“Notice to one trustee is sufficient because a subsequent incumbrancer or assignee would be under obligation to inquire of every one of the trustees.” *Per* Westbury, L. C., in *Willes v. Greenhill*, 31 L. J. C. 1. See *Smith v. Smith*, 2 C. & M. 231.

(*e*) *Willes v. Greenhill*, *supra*.

§ 3. PROTECTION OF THE LEGAL ESTATE.

Protection of the legal estate against prior claims.

The Vendor and Purchaser Act, 1874, disallowing protection.

Protection of the legal estate to a purchaser for value without notice.

Purchaser without notice obtaining legal estate after notice—from a prior mortgagee—from a trustee.

Purchaser with notice from purchaser without notice—Purchaser without notice from purchaser with notice—repurchase by trustee.

Prior claims paramount to vendor—claim to set aside or correct the legal title.

Purchaser having legal estate entitled to concurrent equitable remedies—not entitled to auxiliary equitable remedies in aid of legal title.

Plea of purchase for value without notice applies only to the jurisdiction of equity over legal rights—not between merely equitable claims.

Assignee of equitable interest takes it subject to equities without notice.

The doctrine has hitherto prevailed in Courts of Equity, that a purchaser of an estate or interest in land, being invested with the legal estate or having obtained the title deeds or any other legal advantage, cannot be deprived of such legal estate or advantage at the suit of a merely prior and not on other grounds superior equitable claimant. According to this doctrine, priority of acquisition is not allowed to prevail against the legal title, unless some further grounds of preference can be shown.

This doctrine is now restricted by the following enactment, sect. 7 of “the Vendor and Purchaser Act, 1874,” 37 & 38 Vict. c. 78:—“After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right, or interest in land by reason of such estate, right, or interest being protected by or

Protection of the legal estate against prior claims.

Protection disallowed by statute.

tacked to any legal or other estate or interest in such land ; and full effect shall be given in every court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice : provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act."

Protection of
the legal estate
to a purchaser
for value without
notice.

As to estates and interests which are excepted in the proviso, or which otherwise do not come within the operation of the Act, though priority in time of acquisition gives a prior equity against a subsequent purely equitable claimant, a prior claimant will not be aided in equity in obtaining the legal estate from a subsequent claimant who has paid a valuable consideration without notice of the prior claim ; and to a bill for that purpose the defendant may plead the defence of a purchase for value without notice.—“ In the case of a purchaser for valuable consideration, without notice, obtaining upon the occasion of his purchase and by means of his purchase deed some legal estate, some legal right, some legal advantage, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of the court. When once he has satisfied the terms of the plea of purchase for valuable consideration without notice, this court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be ” (a).

(a) *Per James, L. J.*, in *Pilcher v Rawlins*, L. R. 7 Ch. 268 ; 41 L. J. C. 485. See *ante*, p. 144 ; *re Russell Road Purchase*, L. R. 12 Eq. 78 ;

40 L. J. C. 673, where the doctrine was extended to a legal reversion. Marriage is equivalent to value for the purpose of this doctrine, see

This defence may also be maintained in some cases where a purchaser for value without notice at the time of his purchase, has got in the legal estate after notice of the prior claim:—as in the case of a third mortgagee without notice of a second mortgage, after discovery of it, having procured a transfer from the first mortgagee, he may then hold the legal estate against the second mortgagee until he be paid in full (a).

Purchaser without notice obtaining legal estate after notice.

But he cannot maintain this defence where he has taken the legal estate from a trustee for the prior claimant, after notice of the trust; for by taking a conveyance with notice of the trust he becomes affected with the same trust and will not be allowed to retain the legal estate against it (b). And it seems doubtful whether it be available for protection in any case, to obtain the legal estate from a trustee subsequently to the purchase (c).

Obtaining legal estate from trustee.

Dilkes v. Broadmead, 2 D. F. & J. 566; 30 L. J. C. 268; *Maxfield v. Burton*, L. R. 17 Eq. 15; 43 L. J. C. 46; and it extends to all the interests under a marriage settlement coming within the consideration of the marriage, as those of the husband and wife and children. *Nairn v. Prowse*, 6 Ves. 752.

affected by the prior dealings of the vendor.

(b) *Lewin*, 557; *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Hare, 272; 16 L. J. C. 370; 11 Jur. 527; *Mumford v. Stokwasser*, 43 L. J. C. 694. See *ante*, p. 145.

(c) According to Jessel, M. R., "There is no doubt that you cannot gain priority by obtaining the legal estate from a trustee who commits a breach of trust in transferring it to you." *Maxfield v. Burton*, L. R. 17 Eq. 17; 43 L. J. C. 46; see *Mumford v. Stokwasser*, *supra*. Romilly, M. R., has laid down that "if the owner in fee simple, having the legal estate, creates an equitable charge in favour of A., and afterwards a second equitable charge in favour of B., and then a third equitable charge in favour of C., he cannot alter these equities by transferring the legal estate to any one of them." *Sharples v. Adams*, 32 Beav. 213; 11 W. R. 450; and see *per James, L. J.*, in *Pilcher v. Rawlins*, L. R. 7 Ch. 268; 41 L. J. C. 489; *Burt v. Trueman*, 29 L. J. C. 902.

(a) See *post*, p. 509; *Blackwood v. London Chartered Bank of Australia*, L. R. 5 P. C. 89; 43 L. J. P. C. 25, where it was said in the judgment, delivered by Selborne, L. C.,—"There is nothing more familiar than the doctrine of equity that a man who has *bond fide* paid money without notice of any other title, though at the time of the payment he, as purchaser, gets nothing but an equitable title, may afterwards get in a legal title if he can, and may hold it; though during the interval between the payment and the getting in the legal title he may have had notice of some prior dealing inconsistent with the good faith of the dealing with himself." In that case the title got in was a lease from the Crown to which the vendor was entitled, and the Crown was not

Mortgagee not a trustee for subsequent claimant.

It may be observed that a legal mortgagee is not a trustee for any ulterior claimants, although he may have notice of them; he holds the estate in his own right until he be paid off, and may transfer it to whom he will, subject only to the equity of redemption, and his transferee holds it equally unfettered with trusts (a). But the transferee of a mortgage debt, without the concurrence of the mortgagor, is in no better position than the mortgagee in respect of the debt transferred; and if that debt be invalid, he obtains no charge upon the land, though he gave a valuable consideration and had no notice of the invalidity (b).

Purchaser with notice from purchaser without notice.

The plea of purchaser for value without notice in respect of the legal estate is available to all purchasers or claimants under such purchaser; they may rely upon the position of the vendor at the time of his purchase, though they took after notice to him or to themselves.—It is also available to a subpurchaser for value without notice, although his vendor was affected with notice originally (c).—But if the trustee who has conveyed the land to a purchaser for value without notice, himself repurchase the land, though for a valuable consideration, he cannot rely upon the title of his vendor; but the land in his hands will be again charged with the trust (d).

Prior claims paramount to title of vendor.

The protection of the legal estate to a purchaser for value without notice is available not only against claims under the same vendor, but also against claims paramount to his title, as where the vendor, as to the equitable title, was in possession under a forged will (e).—In a case

(a) See *ante*, p. 296; *post*, p. 510; see *per* Wood, V. C., in *Bates v. Johnson*, John, 304; 28 L. J. C. 509.

(b) *Burt v. Trueman*, 29 L. J. C. 902; *Parker v. Clarke*, 30 Beav. 54; *Forley v. Cooke*, 1 Giff. 230; 27 L. J. C. 185.

(c) *Lowther v. Carlton*, 2 Atk. 242; *Harrison v. Forth*, Prec. Ch. 51; *per* Eldon, L. C., *McQueen v. Farquhar*, 11 Ves. 478.

(d) See *ante*, p. 144; Lewin on Trusts, 558, 4th ed.

(e) *Jones v. Powles*, 3 M. & K. 581.

where the vendor was in possession as beneficial devisee under a supposed will, but was in fact devisee in trust under the real will, the purchaser was held bound by the trusts (a). But this case was disapproved of by a court of appeal in a recent case in which it was held that a purchaser for value without notice might rely upon deeds to prove his legal title, which had been concealed from him, though the deeds disclosed trusts in favour of a prior claimant (b).

So, a suit to set aside or correct a deed for fraud or mistake, under which the defendant derives a legal title, may be met by the plea that he is a purchaser for value without notice (c).

Claim to set aside or amend the legal title.

A purchaser or mortgagee who has obtained the legal title without notice and without complicity in any fraud is entitled to exercise all his legal rights and remedies against other purchasers or incumbrancers for value without notice, without restraint in equity, and is further entitled to all the ordinary equitable remedies which under the concurrent jurisdiction of courts of equity are incident to the legal estate.—The law has been stated thus: “If the suit be for the enforcement of a legal claim or the establishment of a legal right, then, although this court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if, on the other hand, the legal title is perfectly clear, and attached to that legal title there is an equitable remedy, or an equitable right, which can only be enforced in this court, I have not found any case where this

Purchaser having legal title is entitled to concurrent equitable remedies.

(a) *Carter v. Carter*, 3 K. & J. 617; 27 L. J. C. 74.

(b) *Pilcher v. Rawlins*, L. R. 7 Ch. 259; 41 L. J. C. 74; and see *post*, p. 496.

(c) *Per Westbury*, L. C., in *Phillips v. Phillips*, 31 L. J. C. 326;

see *Heath v. Crealock*, L. R. 18 Eq. 215; 43 L. J. C. 169, where the purchaser's legal title was only by estoppel against his vendor, and was held not to be a defence against a claim to set aside a conveyance which would have fed the estoppel.

court will refuse to enforce the equitable remedy which is incident to the legal right" (a).

Accordingly, a legal mortgagee may foreclose against a purchaser or incumbrancer for value without notice; for he is thereby only standing upon his legal title and exercising his right to call upon the adverse claimant to redeem (b).

Not entitled to auxiliary equitable remedies in aid of legal title.

But a court of equity will not exercise its auxiliary jurisdiction in aid of a legal title against a purchaser for value without notice, so as to deprive him of any legal defence or advantage which he may possess.—“Where an application is made to the auxiliary jurisdiction of the Court by the possessor of a legal title, as by an heir at law, which was the case of *Basset v. Nosworthy*, or by a tenant for life for the delivery of title deeds, which was the case of *Walwyn v. Lee*, and the defendant pleads he is a *bonâ-fide* purchaser for valuable consideration without notice, the defence is good, and the reason given is, that as against a purchaser for valuable consideration without notice, the Court gives no assistance, that is, no assistance to the legal title” (c).

Claim to title deeds from purchaser for value without notice.

Thus, to a bill for discovery and specific delivery of title deeds, the plea that the defendant is a purchaser for value without notice is a good defence (d).—And accordingly, a legal mortgagee claiming foreclosure, as against a purchaser for value without notice who was in possession of the title deeds, was held, though entitled to foreclosure, not to be entitled to an order for the delivery up of the deeds (e).—But where in a foreclosure suit under

(a) *Per Romilly, M. R., in Colyer v. Finch*, 19 Beav. 500; S. C. 5 H. L. C. 905; 26 L. J. C. 65. See *Heath v. Crealock*, L. R. 18 Eq. 215; 43 L. J. C. 169, where the cases are collected and commented on by Bacon, V. C.; *Ratcliffe v. Barnard*, L. R. 6 Ch. 652; 40 L. J. C. 147, 777.

(b) *Colyer v. Finch, Heath v. Crealock*, *supra*.

(c) *Per Westbury, L. C., in Phillips v. Phillips*, 31 L. J. C. 326. See *Ratcliffe v. Barnard*, *supra*.

(d) *Basset v. Nosworthy*, Cas. t. Finch, 102; 2 W. & T. L. C. 1; *Walwyn v. Lee*, 9 Ves. 24; *Joyce v. De Moleyns*, 2 J. & L. 274.

(e) *Head v. Egerton*, 3 P. Wms. 280; *Hunt v. Elmes*, 2 D. F. & J. 578; 30 L. J. C. 255.

like circumstances a sale was ordered, it was further ordered, that for the purpose of the sale the deeds must be produced, and that they should be delivered over to whomsoever should become the purchaser under the sale (a).

The above doctrines are founded on the principle that, as between parties having legal rights, a court of equity will not interfere against a purchaser for value without notice; it will neither deprive him of the legal title nor aid the legal title against him (b). But the principle has no application to purely equitable claims, where the legal estate is outstanding, and the beneficial interest is claimed by several adverse but equally innocent purchasers for value without notice; the court may then be called upon to declare the right to the estate in question. In such cases the court necessarily makes a decree against some one or more purchasers for value; and such a decree will further regulate the disposition of the legal estate and the possession of the title deeds, if necessary to complete and enforce the equitable title (c).

Plea of purchase for value applies only to the jurisdiction of equity over legal rights.

Not between adverse claims purely equitable.

The purchaser of a purely equitable interest *primâ facie* takes it subject to all the equities chargeable against his vendor in respect of it, though he gave a valuable consideration and had no notice. So far as depends upon his purchase, and independently of the conduct of adverse claimants, he can take no better title than his vendor (d). Thus, if an equitable mortgagee, affected with notice of a prior charge, transfer it to another without notice, his assignee is equally bound by the prior charge (e). So if he have obtained the mortgage by a fraud entitling the mortgagor to have it set aside, his assignee though with-

Assignee of equitable interest takes it subject to equities without notice.

(a) *Thorpe v. Holdsworth*, L. R. 7 Eq. 139; 38 L. J. C. 194; followed in *Heath v. Crealock*, 43 L. J. C. 169; L. R. 18 Eq. 215; but see *Heath v. Crealock*, on appeal, Weekly Notes, 1874, p. 188.

(b) See *ante*, p. 490, n (a).

(c) *Newton v. Newton*, L. R. 4 Ch. 143; 38 L. J. C. 145.

(d) See *ante*, p. 478; Lewin on Trusts, 453, 4th ed.

(e) *Ford v. White*, 16 Beav. 120.

out notice takes it subject to the equitable relief against the fraud (*a*).

Priority under
Vendor and
Purchaser Act,
1874.

The priority of all claims arising since the enactment above mentioned of the Vendor and Purchaser Act, 1874, so far as the operation of that Act may extend, will be determined upon purely equitable considerations, without allowing any priority or protection to any legal estate or interest; and the legal title will in all such cases follow the priority in equity (*b*).

§ 4. THE DOCTRINES OF NOTICE.

Notice of prior claim—notice before payment—before conveyance.

Actual and constructive notice—duty of inquiry.

Notice of deeds belonging to the title and their contents—trusting to representations as to the deeds—notice of possession of deeds by banker or solicitor—deeds suppressed by fraud or accident—informality or defect in deeds.

Constructive notice from the possession of the land—rights and equities of tenant in possession.

Notice to solicitor or agent—solicitor also solicitor of vendor—fraud of solicitor.

Lis pendens affects purchaser as to rights in question—must be registered.

Crown debts—do not affect purchaser unless writ issued and registered.

Judgments—statute taking away their effect upon land until execution—as to interests not capable of delivery in execution—purchaser with notice of registered judgment—judgment operates only upon beneficial interest of debtor.

Registration in Middlesex and Yorkshire—notice prevails notwithstanding registration—registration under 25 & 26 Vict. c. 53.

Notice of prior
claim.

A purchaser or incumbrancer acquiring any estate or interest after notice of a prior claim acquires such interest only as he knows his vendor can justly dispose of.

(*a*) *Cockell v. Taylor*, 15 Beav. cited *ante*, p. 488 (*b*).
103; 21 L. J. C. 545. See the cases (*b*) See *ante*, p. 485.

He cannot, therefore, claim any priority or protection by reason of holding any legal estate or advantage; but in respect of such legal estate he will be in the position of a trustee for the prior claimant of whose rights he had notice (*a*).—Also any question of fraud or negligence on the part of the prior claimant relatively to himself, as a ground of priority, would, in general, be excluded by the fact of his knowledge of the prior claim (*b*).

It becomes important, therefore, on the above grounds to consider the doctrines of notice as affecting priority in equity; but it may be observed that since the passing of the above mentioned enactment of the Vendor and Purchaser Act, 1874, which disallows the priority and protection before attributed to the legal estate in a purchaser for value without notice, the doctrines of notice have a correspondingly diminished application (*c*).

Though a purchaser or incumbrancer have no notice at the time of contracting for the purchase or charge, yet if he receive notice before payment of the purchase money or consideration, notwithstanding he have given security for it, he will take the property subject to the prior claim (*d*).—And though he have paid the purchase money without notice, if he receive notice before taking the conveyance, he will be entitled to no protection or preference from the legal estate (*e*).

Notice may be actual as a matter of fact; or constructive, that is, which is imputed to a person by presumption or rule of law.

A purchaser is taken to know all matters concerning which he was bound generally, or under the special circumstances, to inquire, and by inquiry would have obtained the knowledge imputed to him.—But a pur-

(*a*) See *ante*, pp. 145, 486.

(*b*) See *ante*, p. 479.

(*c*) See *ante*, p. 485.

(*d*) *Tourville v. Naish*, 3 P. Wms.

307; *Hardingham v. Nicholls*, 3 Atk. 304.

(*e*) *Wigg v. Wigg*, 1 Atk. 384.

See *ante*, p. 487.

chaser is not affected with notice, if he honestly and without negligence trusts to representations made to him respecting the matter, either in answer to proper inquiries, or which prevent or dispense with his making the proper inquiries (a).

Constructive
notice.

From notice of
matter for
inquiry.

Abstaining from
inquiry to avoid
notice.

It has been asserted judicially "that the cases in which constructive notice has been established resolve themselves into two classes :—First, cases in which the party charged has had actual notice that the property was in fact incumbered or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the incumbrance or other circumstance affecting the property of which he had actual notice ; and secondly, cases in which the court has been satisfied from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice.—The proposition of law upon which the former class of cases proceeds is not that the party charged had notice of a fact or instrument, which related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law upon which the second class of cases proceeds is, not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries for the purpose of avoiding knowledge" (b).

Notice of deeds
and their con-
tents.

A purchaser is presumed in law to investigate the title and to inquire respecting all deeds and instruments forming part of the title, and all deeds recited or referred to therein ; also respecting all deeds apparently wanting

(a) *Dixon v. Muckleston*, L. R. 8 Ch. 161 ; 42 L. J. C. 210 ; *Roberts v. Croft*, 2 D. & J. 1 ; 27 L. J. C. 220 ; see *ante*, p. 481 ; and see the notes to *Le Neve v. Le Neve*, 2 W. & T. L. C. 43, 3rd ed.

(b) *Per Wigram, V. C.*, in *Jones v. Smith*, 1 Hare, 55 ; S. C. 1 Ph. 244 ; further explained by Wigram, V. C., in *West v. Reid*, 2 Hare, 257.

in the title ; and if he neglect to inquire he is presumed to have notice of the contents of the deeds, and of all such dealings with them, as would have been disclosed on inquiry (a).

But if he make a proper inquiry, and a reasonable account be given respecting the deeds, which he honestly relies upon, he is affected only with such notice as he in fact obtains (b).—"In transactions of sale and mortgage, if no inquiry is made as to deeds which constitute the title to the property, the Court is justified in assuming that the purchaser abstains from making the inquiry from a suspicion that the title will be affected by the inquiry, if made, and it is, therefore, bound to impute to the purchaser or mortgagee a knowledge of the facts which would have been disclosed on inquiry ; but where an inquiry is made and a reasonable excuse given, and there is no ground to impute suspicion, this principle cannot apply " (c)—And accordingly where a party has notice of a deed which does not necessarily—which may or may not—affect the property, and is told that it does not affect it but relates to some other property, and the party believes the representation to be true, he is not fixed with notice of the instrument " (d).

Trusting to representations as to deeds.

Notice of title deeds being at the bankers of the owner, without any inquiry being made thereupon, was held to operate as constructive notice of a charge the bankers

Notice that deeds at bankers.

(a) "A purchaser must be presumed to investigate the title of the property he purchases, and may, therefore, be presumed to have examined every instrument forming a link, directly or by inference, in that title ; and that presumption I take to be the foundation of the whole doctrine. But it is impossible to presume that a purchaser examines instruments not directly nor presumptively connected with the title, only because they may by possibility affect it." *Per* Wigram, V. C., in *West v. Reid*, 2 Hare, 260 ; *Jackson v. Rowe*, 2 Sim. & St. 472 ; *Wor-*

mald v. Maitland, 35 L. J. C. 69.

(b) *Jones v. Smith*, 1 Hare 43 ; 1 Phill. 244 ; *Hewitt v. Loosemore*, 9 Hare, 449 ; 21 L. J. C. 69 ; *Espin v. Pemberton*, 3 D. & J. 554 ; 28 L. J. C. 311 ; *Ruteliffe v. Burnard*, L. R. 6 Ch. 652 ; 40 L. J. C. 147, 777 ; *Dixon v. Muckleston*, *supra* ; *Agra Bank v. Barry*, L. R. 7 H. L. 135. See *ante*, p. 481.

(c) *Per* Turner, V. C., in *Hewitt v. Loosemore*, *supra*.

(d) *Per* Lyndhurst, L. C., in *Jones v. Smith*, 1 Phil. 253 ; and see *per* Wigram, V. C., in *West v. Reid*, 2 Hare, 260.

Notice that deeds
at solicitors.

had upon them for advances (a).—But notice of the deeds being in the custody of the solicitor of the owner was held to be no notice of a charge by the solicitor, (beyond his ordinary professional lien,) because it is an ordinary course for a solicitor to have the custody of his client's deeds (b).

Deeds sup-
pressed by
fraud or acci-
dent.

A purchaser may rely on deeds necessary to support his legal title, of which he had no notice, actual or constructive, at the time of acquiring it, without being affected with the trusts or equities shewn in the deeds; as where such deeds have been suppressed by accident or design at the time of the purchase, and an apparently good title shewn without them.—Thus, a mortgagor having borrowed trust money by a mortgage deed expressly noticing the trust, took a re-conveyance without paying off the *cestui que trust*, and afterwards by suppressing the mortgage and re-conveyance shewed a good title to a purchaser and sold and conveyed to him the estate; it was held that the purchaser was entitled to retain the legal estate against the *cestui que trust*, notwithstanding the mortgage and re-conveyance were necessary steps in his title (c).

Informality or
defect in deed.

An informality or defect in a deed would, in general, indicate a corresponding defect in the title or transaction therein recorded, of which notice would be imputed; as the absence of the usual receipt for the purchase money; or the receipt appearing in an unusual form or place (d).—And a person is affected with notice of all circum-

(a) *Maxfield v. Burton*, L. R. 17 Eq. 15; 43 L. J. C. 46.

(b) *Bozon v. Williams*, 3 Y. & J. 150.

(c) *Pilcher v. Rawlins*, L. R. 7 Ch. 259; 41 L. J. C. 485; disapproving *Carter v. Carter*, 3 K. & J. 617; 27 L. J. C. 74, in which case a devisee under a supposed last will conveyed to a purchaser, but it appeared from a later will that he was in fact devisee in trust for others;

and it was held that the purchaser, as deriving title from the will, was bound by the trusts. See *ante*, p. 489. It may be observed with respect to these cases that in future the legal title will not be of any avail against a prior and not inferior equitable claim. See *ante*, p. 485.

(d) *Kennedy v. Green*, 3 M. & K. 699; and as to the effect of signing the receipt for the purchase money, see *ante*, p. 481.

stances apparent upon the deeds which a solicitor, if employed by him, would have discovered on his behalf; he cannot avoid such notice by not having used the ordinary caution of employing a solicitor to protect his interest (a).

A purchaser is bound to inquire respecting the possession of the land; and possession by a person other than the vendor is constructive notice of his title or interest (b). —Hence the legal estate is no protection to a purchaser for value from a vendor out of possession (c).—And, “whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates these tenants have” (d).

This constructive notice extends to any contract or equity of the tenant in possession affecting the title, which the tenant would be presumed to communicate to an intending purchaser in answer to inquiries; as a covenant or agreement to renew his lease, or a contract to sell to the tenant (e).—So with terms of the tenancy concerning valuations to an outgoing tenant (f).—In a recent case land was vested in two persons as tenants in common in fee, who entered into partnership and occupied the land under an agreement that it should be partnership property; one of them subsequently mortgaged his estate in the land to a person who had notice that it was occupied by the firm for partnership purposes; it was held that he had constructive notice of the title of the partnership, and that his claim must be postponed to claims on the partnership assets, even in respect of debts incurred subsequently to the mortgage (g).

Constructive notice imputed from the possession of the land.

Contracts and equities of tenants.

(a) *Kennedy v. Green*, supra.

(b) See notes to *Le Neve v. Le Neve*, 2 W. & T. L. C. 46. *Mumford v. Stohwasser*, 43 L. J. C. 694.

(c) *Per Eldon*, L. C., in *Daniels v. Davison*, 16 Ves. 252; *Ogilvie v. Jeaffreson*, 2 Giff. 353; 29 L. J. C. 905.

(d) *Per Loughborough*, L. C., in *Taylor v. Stibert*, 2 Ves. jun. 440.

(e) *Daniels v. Davison*, 16 Ves. 249; 17 Ib. 433.

(f) *Phillips v. Miller*, 43 L. J. C. P. 74; L. R. 9 C. P. 196.

(g) *Cavander v. Bulteel*, L. R. 9 Ch. 79; 43 L. J. C. 370.

Constructive notice does not extend to superior title.

But this constructive notice does not extend to all the equities of those through whom the actual tenant in occupation derives title. "If at the time of the purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenant contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee, until he arrives at the person entitled to the original lease" (a).—Nor does it extend to equities or agreements not connected with the title, and which the tenant would have concealed (b).—Nor if the possession be vacant is the purchaser bound to inquire of the last occupier, though the land be described as late in his occupation (c).

Possession vacant.

Constructive notice of the rights of tenant not imputed as against the vendor.

The doctrine of constructive notice imputed to a purchaser, of the rights and equities of the tenant in possession, is not applied for the benefit of the vendor. As between vendor and purchaser the rights of the purchaser rest upon the descriptions and representations upon which the contract is based; and a misdescription by the vendor cannot be remedied by constructive notice in the purchaser (d).

Notice to solicitor or agent.

Notice to the counsel, solicitor, or agent of a purchaser is constructive notice to their principal; provided, as a general rule, that the notice was obtained in the same transaction or at least during the employment; though

(a) *Per* Leach, M. R., in *Hanbury v. Litchfield*, 2 M. & K. 633.

(b) See *Carter v. Williams*, L. R. 9 Eq. 678; 39 L. J. C. 560.

(c) *Miles v. Langley*, 1 Russ. & M. 39; 2 Ib. 626.

(d) *Caballero v. Henty*, L. R. 9 Ch. 447; 43 L. J. C. 635, disapproving the dicta to the contrary in *James v. Lichfield*, L. R. 9 Eq. 51; 39 L. J. C. 248. "If there is any-

thing in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired, you would have found out all about it.' *Per* James, L. J., in *Caballero v. Henty*, supra.

under special circumstances the rule may be more extensive (a).—"Notice to an agent or counsel who was employed by another person, or in another business, and at another time, is no notice to his client who employs him afterwards" (b).

The same rule applies where the solicitor is also the solicitor of the vendor or mortgagor in the matter of the purchase. And the rule has here a wider application; for the constructive notice through the solicitor will include prior dealings with the property by the vendor through the same solicitor. Thus, a mortgagee employing the mortgagor's solicitor will, in general, have constructive notice of previous mortgages made by him of the same land (c).

Where the mortgagor is himself a solicitor and prepares the mortgage deed, though the mortgagee employ no other solicitor, the relation does not necessarily arise so as to fix the mortgagee with constructive notice; but some consent must be proved on the part of the mortgagee that the mortgagor should act as his solicitor (d).

Constructive notice is not, in general, imputed of a fraud of the solicitor or agent, which it is presumed he would conceal; but a fraud of the solicitor upon his client does not prevent the application of the general rules of constructive notice in favour of a prior claimant who is no party to the fraud, though the fraud might necessarily involve the concealment of the knowledge imputed (e).

(a) See the notes to *Le Neve v. Le Neve*, 2 W. & T. L. C. 55; *Sheldon v. Cox*, 2 Eden, 228; see *Mountford v. Scott*, Turn. & R. 274, 280.

(b) *Per* Hardwicke, L. C., in *Worsley v. Earl of Scarborough*, 3 Atk. 392; and see *per* Wigram, V. C., in *Fuller v. Benett*, 2 Hare, 404.

(c) *Brotherton v. Hatt*, 2 Vern. 574; *Hargreaves v. Rothwell*, 1 Keen, 154; see *per* Wigram, V. C., in *Fuller v. Benett*, 2 Hare, 405;

Tweedale v. Tweedale, 2 Beav. 341, *Rolland v. Hart*, L. R. 6 Ch. 678; 40 L. J. C. 345.

(d) *Espin v. Pemberton*, 4 Drew. 333; 3 D. & J. 554; 28 L. J. C. 311.

(e) *Kennedy v. Green*, 3 M. & K. 699; *Atterbury v. Wallis*, 8 D. M. & G. 454; 25 L. J. C. 792; *Ogilvie v. Jeaffreson*, 2 Giff. 353; 29 L. J. C. 905; *Rolland v. Hart*, L. R. 6 Ch. 678; 30 L. J. C. 345.

lis pendens.

A *lis pendens* or suit relating to the property affects a purchaser *pendente lite*, and his title is, in general, subject to the result of the litigation,—in accordance with the maxim, *pendente lite nihil innovetur* (a).

extends to rights
in question in
the suit.

The effect of a *lis pendens* upon a purchaser extends only to the rights in question in the suit, which require to be ascertained; it does not apply to other rights, though apparent upon the proceedings in the suit; as the equity of a defendant against a co-defendant which is not required to be adjudicated upon for the purposes of the suit (b).—It extends to the solicitor's charge for his costs upon the property recovered or preserved in the suit, under the Solicitors Act, 1860, 23 & 24 Vict. c. 127, s. 28 (c).

solicitor's charge
for costs.

effect ceases
upon judgment
or decree.

A *lis pendens* and its consequent operating effect upon a purchaser *pendente lite* ceases upon judgment or decree; although the judgment remain to be carried into execution (d).

registration of
pendens.

The statute 2 & 3 Vict. c. 11, ss. 7, 8, has enacted that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until it has been registered in the manner provided in the statute.

duty of solicitor
to register,

It is the duty of the solicitor of a claimant in the suit to register, and he is responsible to his client for neg-

(a) See notes to *Le Neve v. Le Neve*, 2 W. & T. L. C. 62; "It is scarcely accurate to speak of *lis pendens* as affecting a purchaser upon the doctrine of notice, although undoubtedly the language of the Court often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow to litigant parties, pending the litigation, rights in the property in dispute, so as to prejudice the opposite party.—If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before a final decree to a person who had no notice of pend-

ing proceedings, would always render a new suit necessary." *Per* Cranworth, L. C., in *Bellamy v. Sabine*, 1 D. & J. 566; 26 L. J. C. 797; *per* Turner, L. J., *Ib.*; and see *per* Grant, M. R., in *Bp. of Winchester v. Paine*, 11 Ves. 197.

(b) *Bellamy v. Sabine*, *supra*; *Worsley v. Earl of Scarborough*, 3 Atk. 392; see *Tyler v. Thomas*, 25 Beav. 47.

(c) *Jones v. Frost*, L. R. 7 Ch. 773; 42 L. J. C. 47.

(d) *Worsley v. Earl of Scarborough*, *supra*; *Kinsman v. Kinsman*, 1 Russ. and M. 617; see *Berry v. Gibbons*, L. R. 8 Ch. 747; 42 L. J. C. 89.

lecting to register (a).—And it is the duty of the solicitor of a purchaser or mortgagee to search the register of pending suits; as also it is his duty to search the register of crown debts, judgments, and other incumbrances which may affect the land, before the completion of the purchase or mortgage (b).

Debts to the Crown by record and specialty and from accountants to the Crown are made a charge upon the real estate of the debtor, legal and equitable, by various statutes; and they take priority over a purchaser without notice; but they must be registered according to statute, otherwise a purchaser even with notice cannot be charged with them (c).

By the statute 28 & 29 Vict. c. 104, s. 48, it is enacted as to such Crown debts incurred after the commencement of the Act, that they shall not affect any land as to a *bonâ-fide* purchaser for valuable consideration or a mortgagee, whether he have or have not notice thereof, unless a writ of extent or other process of execution thereon has been issued and registered (see sect. 49), before the execution of the conveyance or mortgage and the payment by him of the purchase or mortgage money (d).

Until a recent enactment a judgment operated as a charge in equity upon the estates and interests in land of the debtor, legal and equitable, which were capable of being taken in execution under it; subject, as to subse-

(a) *Plant v. Pearman*, 41 L. J. Q. B. 169.

(b) See 1 *Prideaux Convey.* 135; *Sugden Vend. & Purch.* c. xii.; *Dart Vend. & Purch.* c. xi. It is also usual to search the County Register, in counties where there is a register; and it is sometimes required to search the Court Rolls, if the land be copyhold. The Court Rolls of a manor do not, in general,

affect a purchaser with constructive notice. *Bugden v. Bignold*, 2 Y & C. C. 377. As to the right of a person having an interest to inspect the rolls, see *ante*, p. 73.

(c) See 2 Vict. c. 11, ss. 8, 9, 10; 22 & 23 Vict. c. 35, s. 22.

(d) See further as to Crown debts, 1 *Prideaux Convey.* 153, 7th ed.; *Prideaux on Judgments and Crown debts*,

quent purchasers and mortgagees, to the statutes requiring registration of the judgment (a).

Not to affect
land until execu-
tion.

By the statute 27 & 28 Vict. c. 112, passed to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, it is enacted:—By section 1, that “no judgment to be entered up after the passing of this Act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment” (b).

Judgment in-
cludes decrees
and orders.

By section 2, “In the construction of this Act the term ‘judgment’ shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment; and the term ‘land’ shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein.”

Writ of execu-
tion to be regis-
tered.

Section 3 provides that every writ or other process of execution of such judgment by virtue whereof any land shall have been actually delivered in execution shall be registered as therein provided and that no other or prior registration shall be necessary for any purpose.

Order for sale of
land delivered in
execution.

Section 4 provides that “every creditor to whom any land of his debtor shall have been actually delivered in execution by virtue of any such judgment, and whose writ or other process shall be duly registered shall be entitled to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor’s interest in such land.”

The Act while it deprives judgments of any charge

(a) 1 & 2 Vict. c. 110, ss. 11, 13, 19; 2 & 3 Vict. c. 11, ss. 4, 5. See 1 *Prideaux Convey.* 135; *Prideaux on Judgments*; and see *post*, Part IV. ‘Transfer by Legal Process.’

(b) This Act in effect repeals 1 & 2 Vict. c. 110, s. 13; and a registered judgment creditor before exe-

cution has no charge upon the land, and is no longer a necessary party to a foreclosure suit. *Re Bailey’s Trusts*, 38 L. J. C. 237; *Earl of Cork v. Russell*, L. R. 13 Eq. 210; 41 L. J. C. 226. See *Mildred v. Austin*, L. R. 8 Eq. 220.

upon the land until actually delivered in execution, makes no express provision for interests in land which are not capable of such actual delivery ; as an equity of redemption (a) ;—or an equitable interest in leasehold (b) ;—or a remainder or contingent interest (c) ;—or where the land has been already taken under a prior writ (d).

Interests in land not capable of delivery.

In such cases the judgment creditor must proceed in equity to enforce his judgment by redeeming the prior charges or obtaining such other relief as may be equivalent to delivery ; and in such proceedings he may further obtain complete relief by sale or foreclosure, without a separate petition under the fourth section of the Act (e).

Proceedings in equity to enforce judgment.

As to judgments entered up before the passing of the above Act, a subsequent purchaser or mortgagee, with notice, is bound by the judgment as a charge upon the land, subject to the condition imposed by statute of it being duly registered ; but if the judgment be not duly registered notice is immaterial, and the judgment creditor is postponed (f).

Purchaser with notice of registered judgment.

Registration alone does not amount to notice, and the purchaser is not bound to search ; but if he do search, it will be presumed that he had the notice which might be obtained by searching (g).

Registration is not notice.

(a) *Thornton v. Finch*, 4 Giff. 515 ; 34 L. J. C. 466 ; *Hatton v. Haywood*, L. R. 9 Ch. 229 ; 43 L. J. C. 372.

(b) *Re Duke of Newcastle*, L. R. 8 Eq. 700 ; 39 L. J. C. 63.

(c) *Re South*, L. R. 9 Ch. 369 ; 43 L. J. C. 372.

(d) *Re Cowbridge Ry. Co.*, L. R. 5 Eq. 413 ; 37 L. J. C. 306. Hence judgment creditors now take priority according to the delivery of the writ to the sheriff. *Guest v. Cowbridge Ry. Co.*, L. R. 6 Eq. 619 ; 37 L. J. C. 909.

(e) *Beckett v. Buckley*, L. R. 17 Eq. 435. "Any lawful authority which could cause such a delivery as the subject matter was capable of, seems to me to satisfy the language of the statute ; and in any

case in which the judgment creditor must have come into equity to remove a legal impediment, the judgment and execution issued being the foundation of his right, it appears to me that the relief given is substantially a delivery in execution, whether in form it be a writ of assistance or of sequestration, or the appointment of a receiver." *Per Selborne, L. C.*, in *Hatton v. Haywood*, L. R. 9 Ch. 235 ; 43 L. J. C. 372. See *re Rush*, 39 L. J. C. 759 ; *Wells v. Kilpin*, L. R. 18 Eq. 298.

(f) 3 & 4 Vict. c. 82, s. 2 ; 18 & 19 Vict. c. 15, ss. 4, 5. See *Davis v. Strathmore*, 16 Ves. 419 ; *Lee v. Green*, 6 D. M. & G. 155 ; 25 L. J. C. 269.

(g) *Robinson v. Woodward*, 4 D.

Judgment operates only upon the beneficial interest.

A judgment operates as a charge in equity only upon the beneficial interest of the debtor, and is subject to all prior equitable charges and interests created by him; nor can the judgment creditor claim any protection or priority against prior claims by reason of acquiring the legal estate by execution or otherwise (*a*).

Registration in Middlesex and Yorkshire.

By the Middlesex Registry Act, 7 Anne, c. 20, a deed or conveyance is to be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless registered according to the Act before the registering of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. The Yorkshire Registry Acts are to the same effect (*b*).

Equitable charges created by mere agreement are within the Acts and require to be registered; as an agreement to execute a mortgage, or to make a deposit of title deeds (*c*).—So, a further charge upon a registered mortgage must be registered, or it will lose priority over a subsequent registered charge (*d*).

Notice prevails notwithstanding registration.

The equitable doctrine of notice prevails notwithstanding these Acts; and a purchaser with notice of a prior claim is charged with it in equity notwithstanding he has

& S. 562; *Westbrook v. Blyth*, 3 E. & B. 737; 23 L. J. C. 386; *Procter v. Cooper*, 2 Drew. 1; *Lane v. Jackson*, 20 Beav. 535. It is generally recommended that a search be made, otherwise the purchaser's title will depend upon the fact of his not having had notice, a title which would not be marketable without the concurrence of the judgment creditor. *Freer v. Hesse*, 4 D. M. & G. 495; 22 L. J. C. 597.

(*a*) *Whitworth v. Gaugain*, 1 Phil. 728; *Beavan v. Earl of Oxford*, 6 D. M. & G. 507; 25 L. J. C. 299, where it was held that a judgment had no priority over a voluntary conveyance previously

made. *Kinderley v. Jervis*, 22 Beav. 1; 25 L. J. C. 538. As to the effect of a judgment upon powers, see *ante*, p. 385.

(*b*) 2 & 3 Anne, c. 4, for the West Riding; 6 Anne, c. 35, for the East Riding; 8 Geo. 2, c. 6, for the North Riding. As to the Registry of the Bedford level see 15 Ch. II. c. 17; it applies only for the purposes of the Act. *Willis v. Brown*, 10 Sim. 127.

(*c*) *Neve v. Pennell*, 2 H. & M. 170; 33 L. J. C. 19; *re Wight's Mortgage Trust*, L. R. 16 Eq. 41; 43 L. J. C. 66.

(*d*) *Credland v. Potter*, 43 L. J. C. 484; L. R. 18 Eq. 490.

obtained priority of registration (*a*).—A purchaser without notice may after notice obtain priority by prior registration (*b*).

Registration under these Acts is not alone notice; Effect of registration as notice. a purchaser is not bound to search the register, and negligence is not imputed for omitting to search (*c*). But if he do search, he may be presumed to be acquainted with the contents of the Register during the period for which he searched (*d*).

By the Act “to facilitate the proof of title to, and conveyance of real estates,” 25 & 26 Vict. c. 53, 1862, Registry of title under 25 & 26 Vict. c. 53. which established a registry of title to landed estates of freehold tenure and leasehold estates in freehold lands, and authorised special modes of conveying and disposing of registered lands in addition to those in general use, (see sect. 63,) it is expressly provided with reference to dispositions of such lands, (sect. 74,) “that no unregistered estate or interest, contract or engagement, for the registration whereof provision is made by this Act, shall prevail against the title of any subsequent purchaser for valuable consideration duly registered under this Act” (*e*).

In the case of any fraudulent statement or representation or concealment in obtaining registration the Act Effect of fraud in obtaining registration.

(*a*) *Le Neve v. Le Neve*, Amb. 436; 3 Atk. 646; 2 W. & T. L. C. 28; *Rolland v. Hart*, L. R. 6 Ch. 678; 40 L. J. C. 345. See *Agra Bank v. Barry*, L. R. 7 H. L. 135.

(*b*) *Elsay v. Lutyens* 8 Hare, 159.

(*c*) *Morecock v. Dickens*, Amb. 678; *Ford v. White*, 16 Beav. 120; *re Russell Road Purchase*, L. R. 12 Eq. 78; 40 L. J. C. 673.

(*d*) *Hodgson v. Dean*, 2 S. & St. 221. The Irish Registry Act, 6 Anne, c. 2, differs in this respect, and gives an absolute priority to registration over all subsequent interests. See 2 W. & T. L. C. 41. So under the Ship Registry Act an

interest can be transferred or created upon the register only, and the doctrines of notice have no application. 8 & 9 Vict. c. 89.

(*e*) Registration under this Act, (introduced by Lord Westbury,) which is voluntary, has not been adopted to any considerable extent, and it is now proposed to supersede it by a new scheme of registration embodied in the Land Titles and Transfer Bill which passed through the House of Lords in the Session of 1874, but was withdrawn in the House of Commons with an undertaking to introduce it again in the next Session of Parliament.

provides that "The act or thing done or obtained by means of such fraud or falsehood shall be null and void to all intents and purposes, except as against a purchaser for valuable consideration without notice." (Sect. 105.)

Registration under this Act supersedes the operation of the Middlesex and Yorkshire Registry Acts, as to the lands registered. (Sect. 104).

§ 5. TACKING AND CONSOLIDATING MORTGAGES : MARSHALLING.

The doctrine of tacking—priority by tacking taken away by the Vendor and Purchaser Act, 1874.

Right of mortgagee to tack a further charge against mesne incumbrancers—not allowed after notice—tacking against surety—further charge must be proved by writing.

Right of assignee of mortgage to tack a further charge—assignment after notice—pending suit—notice to first mortgagee.

Mortgage after satisfaction gives no priority—assignee of mortgage in same position as mortgagee.

Mortgagor can give no priority amongst equitable charges by subsequent transfer of legal estate—where legal estate outstanding charges rank in priority of time.

Statute against clandestine mortgages—fraudulent concealment of incumbrance.

Debts not charged cannot be tacked against mortgagor—may be tacked against heir or devisee—not against creditors—tacking judgment debts.

Consolidation of mortgages—by assignee of mortgage—against purchaser or mortgagee of equity of redemption.

The doctrine of marshalling—marshalling securities in favour of second mortgagee—marshalling assets in favour of creditors—in favour of legatees.

Some equitable doctrines regulating the priority of estates and interests in land remain to be noticed in this subsection, namely, the doctrines of tacking and consolidating mortgages, and the doctrine of marshalling.

Upon the principle of equity, which prevailed until the

passing of the Vendor and Purchaser Act, 1874, 37 & 38 Vict. c. 78, that a purchaser for value without notice acquiring the legal estate could not be deprived of it at the suit of a prior claimant merely upon the ground of priority in time of acquisition, was founded the doctrine of tacking mortgages and charges (a).

Doctrine of tacking founded on the protection of the legal estate.

By that Act, section 7, which has been already cited at length (b), the priority or protection allowed to any estate or interest in land by reason of being protected by or tacked to any legal or other estate or interest in such land is taken away, although the person claim such priority or protection as a purchaser for valuable consideration and without notice ; but with a proviso saving any priority or protection which but for that section would have been allowed as against any estate or interest existing before the commencement of the Act.—Therefore the doctrine and rules of tacking now to be stated must be understood as applying only against estates and interests existing at the commencement of the Act ; and as against such as may be created since the date of the Act, (7 Aug. 1874,) they have no application.

Priority by tacking taken away by the Vendor and Purchaser Act, 1874.

By the doctrine of tacking a mortgagee of the legal estate making a further advance or acquiring a further charge upon the same security, without notice of any intermediate charge, is entitled to tack or add the further advance or charge to his original debt, and to hold the legal estate as against intermediate incumbrancers until he be satisfied in full (c).

Right of mortgagee of legal estate to tack further advance.

But the legal mortgagee is not entitled to tack further

(a) See *ante*, p. 485 ; Coote on Mortgages, 385, 3rd ed.

(b) See *ante*, p. 485.

(c) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, 494 ; notes to *Marsh v. Lee*, 1 W. & T. L. C. 559. "A party claiming to tack must, as against the party against whom the tack is to operate, have advanced his money upon the credit

of the land ; 2dly, He must, except as to time have an equal equity ; and 3dly, which follows from the last, he must have advanced his money without notice of the other's claim." *Per Cottenham, L. C.*, in *Lacey v. Ingle*, 2 Ph. 419. And see the doctrine explained in *Liverpool Marine Credit Co. v. Wilson*, L. R. 7 Ch. 507 ; 41 L. J. C. 798.

Tacking not allowed after notice—though mortgage extend to further advances.

advances as against an intermediate mortgage or charge of which he had notice at the time of making the advances. Nor does he become entitled to do so by reason of his mortgage deed being expressly made to extend to further advances; and although the subsequent mortgagee had notice that it so extended (*a*). Where the subsequent mortgage was expressly made "subject to the security already given," which extended to further advances, it was held that further advances with notice could not be tacked against it (*b*).

Right to tack as against surety for mortgage debt.

A mortgagee cannot, in general, tack a further charge as against a surety for the mortgage; for a surety is entitled to the benefit of all the securities unimpaired in the event of being compelled to pay the debt, and cannot be prejudiced by any subsequent transaction between the creditor and the principal debtor (*c*).—But in a case where two sums were advanced at the same time, secured respectively upon separate mortgages to the same mortgagee, and another person at the same time with knowledge of the whole transaction became surety for one of the sums, it was held that he was not entitled on payment to the benefit of the mortgage for which he was surety, and that the mortgagee might retain it against him, until both sums were paid (*d*).

Further charge must be proved by writing.

Further advances made upon the security of a prior legal mortgage cannot be charged by a mere verbal agreement without the evidence in writing required to satisfy the Statute of Frauds (*e*).

(*a*) *Shaw v. Neale*, 20 Beav. 157; 6 H. L. C. 581; *Rolt v. Hopkinson*, 3 De G. & J. 177; 9 H. L. C. 514; 28 L. J. C. 41; 34 Ib. 468.

(*b*) *Menzies v. Lightfoot*, L. R. 11 Eq. 459; 40 L. J. C. 561. But it was there said that the second mortgage might by sufficiently explicit terms be made subject to further advances to be made on the first mortgage.

(*c*) *Bowker v. Bull*, 1 Sim. N. S. 29; 20 L. J. C. 47; *Pearl v. Dea-*

con, 24 Beav. 180; 26 L. J. C. 761; see *Pledge v. Bass*, Johns. 663.

(*d*) *Farebrother v. Wodehouse*, 23 Beav. 18; 26 L. J. C. 81; and see *Williams v. Owen*, 13 Sim. 597. It is necessary to observe that these cases appear to have been decided upon a general rule, contrary to that above stated, that a mortgagee may tack a subsequent charge against a surety; therefore the law seems to be somewhat uncertain.

(*e*) *Ex p. Hooper*, 1 Mer. 7; see

In extension of the same doctrine, a third mortgagee having advanced his money upon the same security without notice of a second mortgage or charge, by taking an assignment of the original legal mortgage may exercise the same right of tacking as against the second mortgagee (a). Right of assignee of mortgage to tack.

The third mortgagee may take an assignment of the first mortgage for the purpose of tacking, after notice of the intermediate charge; provided he was not affected with notice at the time of taking his own mortgage. "Having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion that shows the necessity for it. It is only notice at the time of taking in the third that will affect him; for then, no act he can do will help him" (b).—The third mortgagee may buy in the first legal mortgage pending a suit by the second incumbrancer to realise his security, for the *lis pendens* has no further effect than notice; but he cannot do so after a decree made, for there is then a judgment for the creditors that they shall be paid according to their priorities (c). Assignment of mortgage after notice.

Pending suit.

ante, p. 298. If the land be in a Register County, such charge must be registered. *Credland v. Potter*, 43 L. J. C. 484; see *ante*, p. 504.

(a) *Marsh v. Lee*, 2 Vent. 337; 1 Ch. Ca. 162; 1 W. & T. L. C. 550; *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; per Hardwicke, L. C., in *Wortley v. Birkhead*, 2 Ves. sen. 573. This was called by Lord Hale, "the creditors' *tabula in naufragio*." *Ib. Spencer v. Pearson*, 24 Beav. 266.—"If the first mortgagee or incumbrancer has the legal estate and the third pays him off and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is

limited to the case where the first mortgagee has the legal estate." *Per Westbury, L. C.*, in *Phillips v. Phillips*, 31 L. J. C. 326; see *post*, p. 511, note (b).

(b) *Per Hardwicke, L. C.*, in *Wortley v. Birkhead*, 2 Ves. sen. 574; see *ante*, p. 487.

(c) *Marsh v. Lee*, *supra*; *Wortley v. Birkhead*, *supra*. "But you may, as was held in the House of Lords, (*Belchier v. Renforth*, 6 Bro. P. C. 28,) up to the time of the decree struggle for the *tabula in naufragio*; and though the decree is in a sense only a judgment upon the rights, as they stood at the time the bill was filed, yet it was decided in that case, that until the decree you might do so." *Per Eldon, L. C.*, in *Ex p. Knott*, 11 Ves. 619; *Bates v. Johnson*, John. 304; 28 L. J. C. 509.

Notice to first mortgagee is immaterial.

It is immaterial to the right of the third mortgagee that the first mortgagee have notice of the intermediate charge at the time of transferring his mortgage. For he holds the legal estate in his own right, as security for the debt, and may, therefore, transfer it to whom he pleases, subject only to the equity of redemption; nor can his rights be restrained by a mere notice of other claims; and there is no equity to redeem the estate in the hands of the transferee, without paying off all the advances he may have made upon the security of it without notice of prior claims (*a*).

Satisfied mortgage gives no priority.

But a legal mortgagee, after satisfaction of the debt, can neither tack any subsequent debt of his own, nor can he give any advantage to a subsequent incumbrancer by a transfer of the legal estate; for he has then ceased to hold in his own right and is a bare trustee for the mortgagor and those claiming under him, and the transferee would be affected with the same trust (*b*).—And in general, the assignee of a mortgage debt and security, unless by the concurrence of the mortgagor, is in no better position than the assignor; and if the debt be invalid or subject to equities on the part of the mortgagor, the assignee acquires no greater charge upon the land in respect of it, or of the consideration paid for it (*c*).

Mortgagor can give no priority amongst charges by transfer of legal estate.

Upon a like principle, a mortgagor, having created several successive equitable mortgages or charges cannot

(*a*) *Bates v. Johnson*, Johns. 304; 28 L. J. C. 509. "To give a third mortgagee who has obtained a legal estate (from a first mortgagee) a priority over the second, nothing further is necessary but that he had advanced his money without notice of the second mortgage; the equities of the two parties being equal, this court on that account refuses to interfere, not because he has better, but because he had an equal right."

Per Pepys, M. R., in *Peacock v. Burt*, 4 L. J. C. 73; S. C. in *Coote on Mortgages*, App. 571, 3rd ed.

(*b*) *Ante*, 296, 488. *Mayor of Brecon v. Seymour*, 26 Beav. 548; 28 L. J. C. 606; see *per* Wood, V. C., in *Bates v. Johnson*, Johns. 304; 28 L. J. C. 509.

(*c*) *Burt v. Trueman*, 29 L. J. C. 902; 6 Jur. N. S. 72; *Parker v. Clarke*, 30 Beav. 54.

give an advantage to one of them by a subsequent transfer of the legal estate, as he is trustee for all according to their priorities (a).—And generally, in all cases where the legal estate is outstanding, as where it remains in a first mortgagee, the several incumbrances, in the absence of special circumstances affecting their relative equities, rank according to their priority in time (b).

Where legal estate outstanding priority is in order of time.

The statute against clandestine mortgages (4 & 5 W. & M. c. 16) provides that a mortgagor granting a second mortgage, without giving the second mortgagee notice in writing of the first mortgage, shall forfeit his equity of redemption, and the second mortgagee shall hold the lands as if he had been the absolute purchaser; but the title of the second mortgagee under this statute is very doubtful and precarious, so that it is safer and more usual to resort to his power of sale (c).—By the 22 & 23 Vict. c. 35, s. 24, the fraudulent concealment of any instrument or incumbrance by a seller or mortgagor, or his solicitor or agent, is made a misdemeanour, punishable by fine or imprisonment.

Statute against clandestine mortgages.

Fraudulent concealment of incumbrance.

A mortgagee cannot tack debts, which are not charged upon the estate, even against the mortgagor; and the mortgage may be redeemed upon payment of the mortgage debt only, notwithstanding the mortgage be

Debts not charged cannot be tacked against mortgagor.

(a) *Sharples v. Adams*, 32 Beav. 213; *Mumford v. Stokwasser*, 43 L. J. C. 694. But in a case where, under such circumstances, the legal estate was conveyed by the mortgagor in pursuance of a contract with the first incumbrancer to that effect, it was held to give the right to tack subsequent advances against mesne incumbrances, as if originally conveyed. *Cooke v. Wilton*, 29 Beav. 100; and see *ante*, p. 487.

(b) See *ante*, p. 478; *Brace v. Duchess of Marlborough*, 2 P. Wms. 495; notes to *Mursh v. Lee*, 1 W. & T.

L. C. 561; *Wilmot v. Pike*, 5 Hare, 14; and see *Rooper v. Harrison*, 2 K. & J. 86. "If the Court does not find the legal estate interposed, it deals according to priorities." *Per Wood, V. C.*, *Ib.* "If the first mortgagee has not the legal title, the third mortgagee by payment off of the first acquires no priority over the second." *Per Westbury, L. C.*, in *Phillips v. Phillips*, 31 L. J. C. 326

(c) See observations on this Statute in *Kennard v. Futvoye*, 2 Giff. 81; 29 L. J. C. 553.

a creditor in respect of other debts not charged upon the same security (a).

may be tacked
against heir or
devisee.

Upon the death of the mortgagor the mortgagee can tack against the heir or devisee all such debts as in the administration of assets become charged upon the real estate; which formerly was the case only with specialty debts binding the heir, but since the statute 3 & 4 Will. IV. c. 104, is the case with all debts, as well debts due on simple contract as on specialty, either under a charge of debts by will, or under the statute; and the heir or devisee cannot redeem without paying all such debts (b).—So upon the mortgage of a term of years or other personal estate, the executor cannot redeem without paying all debts to the mortgagee (c).

not against
creditors.

But he cannot tack debts not specifically charged upon the estate against other creditors; who, having a like charge upon the real assets of the deceased mortgagor, are entitled to be paid rateably (d).

acking judg-
ment debts.

A first mortgagee might formerly tack a further sum advanced upon a judgment, as against a mesne mortgagee of whose charge he had no notice, because the judgment operated as a charge upon the land upon the credit of which the mortgagee was presumed to have advanced the money; but a judgment is no longer any charge upon the land until actually delivered in execution (e).—A judgment creditor, by buying in the first mortgage, could not tack or unite the two debts, because the judgment creditor

(a) *Per* Hardwicke, L. C., in *Morret v. Paske*, 2 Atk. 53; *Archer v. Snatt*, 2 Strange, 1107; *per* Arden, M. R., in *Jones v. Smith*, 2 Ves. jun. 376.

(b) See *ante*, p. 262; *Coleman v. Winch*, 1 P. Wms. 775; *Elvy v. Norwood*, 5 D. & Sm. 241; 21 L. J. C. 716; *Rolfe v. Chester*, 20 Beav. 610; 25 L. J. C. 244; *Thomas v. Thomas*, 22 Beav. 341; 25 L. J. C. 391.

(c) See *Coleman v. Winch*, *supra*.

(d) *Heams v. Bance*, 3 Atk. 630;

see *Irby v. Irby*, 22 Beav. 217. But see *Haselfoot's Estate, Chauntler's Claim*, L. R. 13 Eq. 327; 41 L. J. C. 286, where the mortgagee having realised the property and holding the proceeds was held entitled to satisfy unsecured debts, though the estate was insolvent; followed in *re General Provident Ass. Co.*, L. R. 14 Eq. 507; 41 L. J. C. 823.

(e) See *ante*, p. 502; *Brace v. Duchess of Marlborough*, 2 P. Wms. 494; *Baker v. Harris*, 16 Ves. 397.

acquired no specific charge upon the land, but only a general charge upon all the real estate which could be taken in execution; besides, it was said, the judgment creditor does not lend his money upon the credit of the land, and is not deceived by prior judgments or incumbrances (*a*).

The consolidation of mortgages is an extension of the doctrine of tacking.—A mortgagee, having two mortgages upon separate estates of the same mortgagor, upon default in payment, may tack the debts together, and charge the whole sum upon each mortgage. It is a rule of equity, founded upon the principle that he who seeks equity must do equity, that the mortgagor shall not redeem one without redeeming the other; and the mortgagee may claim this equity not only in a suit for redemption, but also in a suit for foreclosure and upon a sale under a power (*b*).

The same right is incident to equitable mortgages (*c*); also where the mortgages are held in trust for the same person, though by different trustees (*d*).

The assignee of separate mortgages made by the same mortgagor has the same right to consolidate.—So also the mortgagee of one estate who subsequently buys in a mortgage upon another estate of the same mortgagor (*e*). Upon the occasion of assigning two mortgages to the same person, it is usual to consolidate them in express

(*a*) *Brace v. Duchess of Marlborough*, 2 P. Wms. 491; see *per Cottenham, L. C.*, in *Lacey v. Ingle*, 2 Ph. 421.

(*b*) 1 W. & T. L. C. 562, notes to *Marsh v. Lee*.—"It is quite settled that, whether the suit is for foreclosure or redemption, the mortgagee has a right to say to the mortgagor, you must redeem entirely or not at all." *Per Cranworth, L. J.*, in *Watts v. Symes*, 1 D. M. & G. 240; 21 L. J. C. 713; and see *per Turner, L. J.*, in *Tussell v. Smith*, 2 D. & J. 713; 27 L. J. C. 694; *Selby v.*

Pomfret, 1 J. & H. 336; 30 L. J. C. 770, where the doctrine was applied to the surplus proceeds of a sale made by the mortgagee under his power.

(*c*) *Neve v. Pennell*, 33 L. J. C. 19; 11 W. R. 986.

(*d*) *Tassell v. Smith*, 2 D. & J. 713; 27 L. J. C. 694.

(*e*) *Bovey v. Skipwith*, 1 Ch. Cas. 201; *Vint v. Padget*, 2 D. & J. 611; 28 L. J. C. 21; *Tweedale v. Tweedale*, 23 Beav. 341; *Beevor v. Luck*, L. R. 4 Eq. 537; 36 L. J. C. 865.

terms by a deed in which the mortgagor is made to concur as a party.

ety for one of
mortgages
y consolidate. A surety for one of two mortgage debts to the same mortgagee, having been compelled to pay it, is entitled to stand in the place of the mortgagee, as to the right of consolidation, and so gain the benefit of both the securities (a).

against pur-
ser or mort-
gee of equity
redemption. The right to consolidate prevails against a purchaser or mortgagee of the equity of redemption of either of the mortgages, although he took it without notice of the other mortgage, or of the mortgages being united in one person; and notwithstanding that the mortgages be not united until after the purchase or mortgage of the equity of redemption, and that the person in whom they unite had notice of it (b).

e doctrine of
marshalling. The rights of a prior claimant against several funds belonging to the same person or estate are subject to the doctrine of marshalling the funds in favour of other

(a) *Heyman v. Dubois*, L. R. 13 Eq. 158; 41 L. J. C. 224.

(b) *Vint v. Padget*, 2 D. & J. 611; 28 L. J. C. 21; *Selby v. Pomfret*, 1 J. & H. 336; 30 L. J. C. 770, where the mortgagee of the one estate got in the other mortgage after the bankruptcy of the mortgagor and was held entitled to consolidate against the assignees. *Beevor v. Luck*, L. R. 4 Eq. 537; 36 L. J. C. 865.—“The real point seems to be this, as far as it is possible to apply reasoning to a rule which is somewhat difficult to reconcile altogether with sound principles: whenever the right to redemption is passed over to another person by the original mortgagor, whether he sells the whole property or passes it by way of mortgage only—in either one case or the other, he passes it over subject to the same equities as against the purchaser or mortgagee to which he himself was subject. That being so, the purchaser is obliged to take

it, as was said in *Vint v. Padget*, knowing that it is liable to the contingency of the coalescing of the two mortgaged estates, even although at the time of the conveyance they may not have coalesced. In *Vint v. Padget*, the person who united the two securities, and then asserted the right, knew before he united them that there was this intervening security. The Court said that the question of notice had nothing to do with it; the Plaintiff has a right to unite the two estates, and, having that right, the person who is affected by it must be taken to have known that there was the possibility of such union taking place.” *Per Wood, V. C.*, in *Beevor v. Luck*, L. R. 4 Eq. 546; 36 L. J. C. 865. It seems difficult to reconcile this doctrine as to notice with the general rule that a mortgagee cannot tack further charges against an intermediate incumbrance of which he has notice. See *ante*, p 508.

claimants. A Court of Equity will marshal, that is, arrange the funds to meet the various claims upon them in such order as, if possible, to satisfy all the claims.

Thus, where a claimant is secured upon two distinct funds, and a subsequent claimant is secured upon one only of those funds, if that fund be insufficient to satisfy both claims, the Court will compel the prior claimant to resort first to the other fund, leaving him, as against the fund common to both, a priority only for the balance of his claim; and consequently, where the prior claimant has realised his claim out of the fund common to both, if that fund prove deficient, and so far as he has exhausted it, the other claimant upon it becomes entitled to stand in his place against the other fund (a).

Prior claimant bound to resort to other funds in favour of second claimant.

Accordingly, where there is a first mortgagee holding a mortgage over two estates, and a second mortgage or other charge over one of the estates only, the first mortgagee may be compelled to resort first to the estate over which there is no second mortgage, in order to leave as much as possible out of the other to the second mortgagee; and if he has realised out of the one estate to the exclusion of the second mortgagee, the latter may resort, in his place, to the other estate (b).

Marshalling securities in favour of second mortgagee.

According to the same doctrine in the administration of the assets of a deceased person, if a creditor resort

Marshalling assets in favour of creditors.

(a) *Aldrich v. Cooper*, 8 Ves. 382; 2 W. & T. L. C. 66; "A person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only, to the intent that the only fund to which the other has access may remain clear to him." *Per Eldon, L. C., Ib.*—Upon this principle where an appointment is made generally out of property

subject to a power, and a subsequent appointment is made out of a specific part of the property, the general appointment must be satisfied first out of the part not specifically appointed and the specific part can be resorted to only in case of deficiency. *Morgan v. Gronow*, L. R. 16 Eq. 1.

(b) 2 W. & T. L. C. 90; notes to *Aldrich v. Cooper*; and see *Hales v. Cox*, 32 Beav. 118; *Mower's Trusts*, L. R. 8 Eq. 110; *Ford v. Tynte*, 41 L. J. C. 758.

to a portion of the assets which is common to other creditors, the latter may stand in his place as against assets to which the former might have resorted but the latter could not. Hence it was, formerly, that if creditors by specialty binding the heirs, who might recover satisfaction out of the real estate, resorted to the personal estate to the exclusion of simple contract creditors who had no remedy against the real assets, the simple contract creditors were allowed satisfaction out of the real assets so far as the specialty creditors had exhausted the personalty (*a*).

The statute 3 & 4 Will. IV. c. 104, has superseded this application of the doctrine of marshalling by rendering the real estate of the deceased of all kinds, which he has not by his will made subject to his debts, assets for the payment of all debts, as well debts due on simple contract as on specialty (*b*).

marshalling
sets in favour
legatees.

The doctrine of marshalling assets is also applied in favour of pecuniary legatees as against the real assets descended or charged with debts. If the creditors have exhausted the personal assets, which are the only fund for the legatees, the latter become entitled to charge the real estate to which the creditors might have resorted, to the extent to which the creditors have exhausted the personalty; and the same doctrine is applied as between legatees, some only of whose legacies are charged upon real estate (*c*).

no marshalling
against devisees.

But this right is restricted to the real assets left to descend or charged with debts by the testator, and there is no marshalling in favour of pecuniary legatees

(*a*) *Aldrich v. Cooper*, 8 Ves. 382; 2 Jarman on Wills, 606; Williams on Ex. 1457, 4th ed.

(*b*) See *ante*, p. 262.

(*c*) 2 W. & T. L. C. 82, 83, notes to *Aldrich v. Cooper*; Williams on Ex. 1459. "The mere bounty of the testator enables the legatee to call

for this species of marshalling; that if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not." *Per* Eldon, L. C., in *Aldrich v. Cooper*, *supra*.

against devisees of the real estate, nor any right of contribution from the latter towards a deficiency of personal estate (a).—A devise to the testator's heir, since the statute 3 & 4 Will. IV. c. 106, s. 3, precludes marshalling against him, as under that statute he is to be considered to have acquired the land as a devisee, and not by descent (b).

(a) *Mirehouse v. Scaife*, 2 M. & Cr. 695; *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, 41 L. J. C. 565; L. R. 14 Eq. 234, in which cases *Hensman v. Fryer*, L. R. 3 Ch. 420; 27 L. J. C. 77; deciding that devisees should contribute rateably with legatees was disregarded as being "clearly a mistaken decision."—"Where lands are specifically devised the legatees shall not stand in the place of the ere-

ditors against the devisees, for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee, and therefore there shall be no marshalling." *Per Eldon*, L. C., in *Aldrich v. Cooper*, 8 Ves. 382. And see 2 Jarman on Wills, 601.

(b) See *ante*, p. 161; *Strickland v. Strickland*, 10 Sim. 374.

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